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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

NO. 295

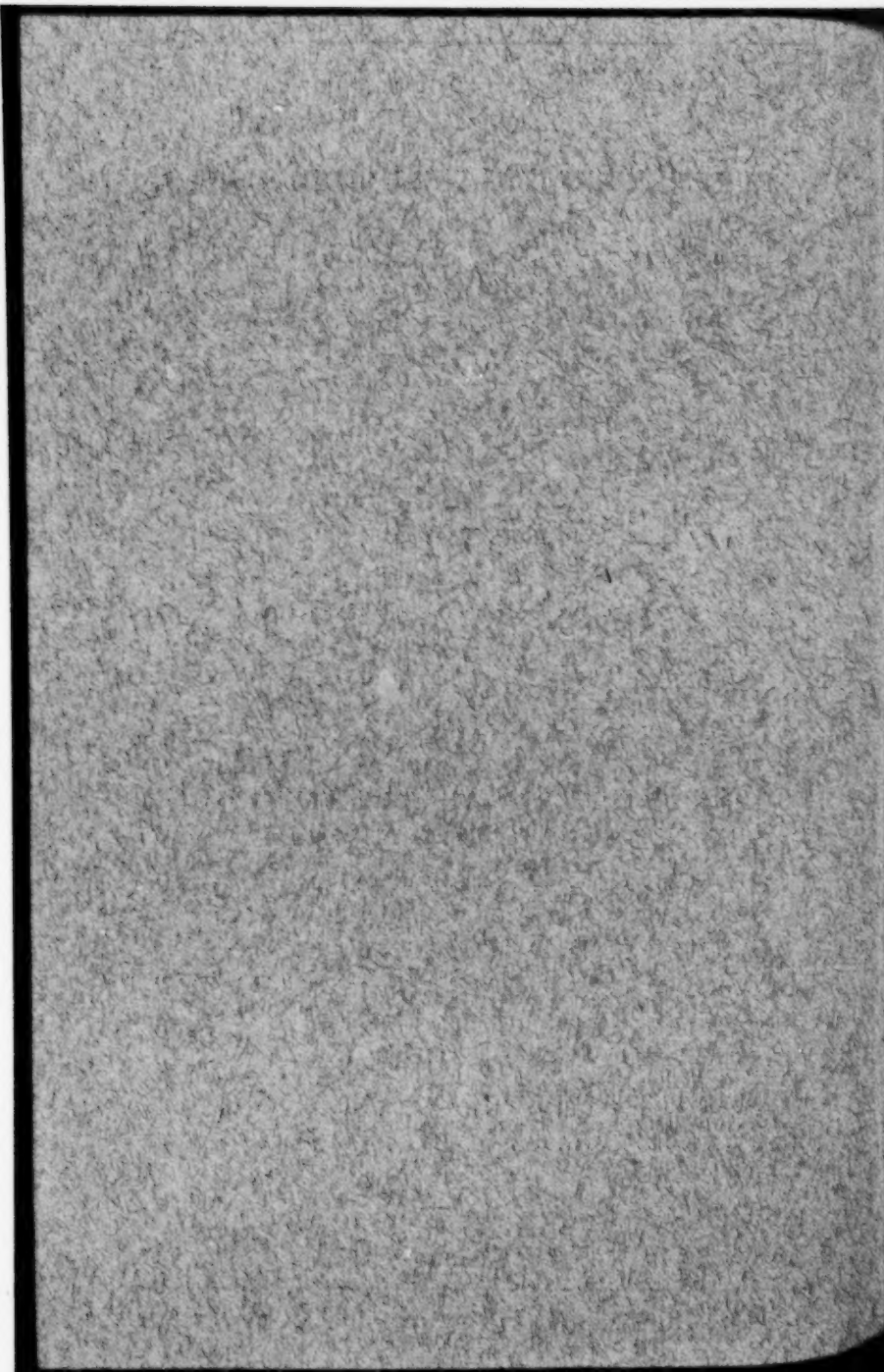
CLOVERLEAF BUTTER COMPANY, a Corporation,
Petitioner (Claimant-Appellee Below)

VS.

UNITED STATES OF AMERICA,
Respondent (Appellant Below)

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES CIRCUIT COURT OF
APPEALS FOR THE FIFTH CIRCUIT

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SUBJECT INDEX

	<i>Page</i>
Petition for Writ of Certiorari.....	1
Summary Statement of Matter Involved.....	2
Opinion Below.....	7
Jurisdiction.....	8
Questions Presented.....	9
Reasons Relied On For Allowance of Writ.....	10
Specifications of Error.....	13
Prayer For Writ.....	15
Appendix.....	16
Renovated Butter Act.....	16
Internal Revenue Code Secs. 2320 et seq.....	16
Regulations For Carrying Renovated Butter Act into Effect.....	24

TABLE OF CASES CITED

Anderson vs. Pacific Coast S. & S. Co. 225 U. S. 187.....	13
Andersen & Company vs. U. S. (CCA 9th Cir.) 284 Fed. 542.....	12
Cloverleaf Butter Co. vs. Patterson, 315 U. S. 148.....	7
Crow Dog, Ex Parte 109 U. S. 556.....	13
Leavenworth L. G. & R. Co. vs. U. S. 92 U. S. 733.....	13
Louisville Underwriters Co. In re: 134 U. S. 488.....	13
Missouri K. & T. R. R. Co. vs. U. S. 92 U. S. 760.....	13
Rodgers vs. U. S. 185 U. S. 83.....	13
Sorrels vs. U. S., 287 U. S. 435, 53 Sup. Ct. 211.....	13
Townsend vs. Little, 109 U. S. 504.....	12
United States, Ex Parte (CCA 5th Cir.) 140 Fed. (2) 19.....	5
United States, Ex Parte 226 U. S. 420.....	13
U. S. vs. 1851 Cartons Frozen Whiting (CCA 10th Cir.) 146 Fed. (2) 760.....	12
U. S. vs. 200 Cases Adulterated Tomato Catsup 211 Fed. 780.....	12
U. S. vs. Krum, 269 Fed. 848.....	12
U. S. vs. 52 Drums Maple Syrup (CCA 2nd Cir.) 110 Fed. (2) 914.....	12
U. S. vs. Dotterweich 320 U. S. 277.....	12
Washington vs. Miller, 235 U. S. 422.....	13

STATUTES CITED

Renovated Butter Act I. R. C. Secs. 2320 et seq.....	2
Renovated Butter Act May 9, 1902, Chap. 784, Sec. 5.....	3-6
32 Stat. at Large 196, Amended-Act August 10, 1912.....	3
37 Stat. 273, making applicable Meat Inspection Laws applicable to Process or Renovated Butter.....	6
Federal Food Drug & Cosmetic Act (June 25, 1938, Chap. 675 Sec. 1) 52 Stat 1040-21 U. S. C. Sec. 301-392.....	11
Judicial Code Sec. 240.....	8
U. S. C. Title 28, p. 347.....	9



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TO THE HONORABLE SUPREME COURT OF
THE UNITED STATES:

Your petitioner, Cloverleaf Butter Company, a corporation organized under the laws of the State of Alabama, respectfully prays that a writ of certiorari issue out of this Honorable Court to review the final decree of the United States Circuit Court of Appeals for the Fifth Circuit, rendered in the cause of United States of America vs 24 Cans containing a total of approximately 1,833 pounds of butter, in possession of Cloverleaf Butter Company, Birmingham, Alabama, and numbered 11040 in said Court, on to-wit, the 5th day of May, 1945, whereby the said Circuit Court of Appeals overruled petitioner's application for a rehearing of the order, judgment or decree rendered by said Circuit Court of Appeals on the 27th day of March, 1945, wherein said Circuit Court of Appeals reversed and remanded with directions the judgment and decree of the District Court of the United States for the Southern Divi-

sion of the Northern District of Alabama, dismissing certain libels instituted by said appellant against certain packing stock butter which was in the possession of and claimed by your petitioner, the opinion of said Circuit Court of Appeals being reported in 148 Fed. 2d 365. And in support of its petition for writ of certiorari, your petitioner respectfully shows:

I.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

The petitioner is engaged under Federal license, duly issued in pursuance of the provisions of the Renovated Butter Act (I. R. C. Secs. 2320 et seq.), and has been so engaged for more than 20 years, in the manufacture of renovated butter for sale and shipment in both interstate and intrastate commerce at its plant in Birmingham, Alabama.

The manufacture and distribution of process or renovated butter is a substantial industry, whose wholesome and successful functioning touches farm producers and city consumers. Science has made possible the utilization of vast quantities of country butter, not then suitable for use as food, but after processing, subject to the regulation and inspection of the Secretary of Agriculture, the resulting commodity is free of ingredients deleterious to health.

Country butter—known to the trade as packing stock butter—is bought by petitioner from farmers, country stores, and rolling stores, in the States of Virginia, North Carolina, South Carolina, Georgia, Tennessee and Alabama, and concentrated at petitioner's plant in the City of Birmingham, solely as the basic raw material to be used in the manufacture of renovated butter.

Renovated butter is defined in Internal Revenue Code, Sec. 2320 (c), and is manufactured by melting the packing stock butter, extracting the butter oil, and then thoroughly

washing, straining, cleansing, pasteurizing, clarifying and refining the extracted oil and mixing the same with a pasteurized milk product and rechurning it in petitioner's plant, which said plant is equipped with the most improved appliances well-adapted to remove all impurities, and uses only the most sanitary methods known to the business.

During the time that petitioner has been so engaged in the manufacture and sale of process or renovated butter, and until the interference complained of, the United States Secretary of Agriculture, pursuant to the special Renovated Butter Act and the regulations promulgated thereunder, through the Bureau of Dairy Industry, has exercised exclusive control and supervision of the manufacture of renovated butter, and of the materials going into the manufacture of the same, as required by the said Renovated Butter Act. See Act May 9th, 1902, Chap. 784, Sec. 5, 32 Stat. at Large 196, Internal Revenue Code, Sec. 2325, which provides:

"The Secretary of Agriculture is authorized and required to cause a rigid sanitary inspection to be made at such times as he may deem proper or necessary, of all factories, and storehouses where process or renovated butter is manufactured, packed or prepared for market, and of the products thereof and materials going into the manufacture of the same. * * * * * And he shall also have the power to ascertain whether or not materials used in the manufacture of said process or renovated butter are deleterious to health or unwholesome in the finished product, and in case such deleterious or unwholesome materials are found to be used in product intended for exportation or shipment into the States or in course of exportation in shipment he shall have power to confiscate the same."

Beginning July 1st, 1940, through October 24th, 1940, the United States District Attorney for the Northern Dis-

trict of Alabama, at the instance of the Federal Security Agency, or the Administrator, in the attempted application to this industry of the Federal Food, Drug and Cosmetic Act, (June 25th, 1938, Chap. 675, Sec. 1, 52 Stat. at Large 1040, 21 U. S. C. A. Appendix, Secs. 301 et seq.), and not by the authority of the United States Secretary of Agriculture, instituted in the District Court of the United States five separate libels of packing stock butter in the possession of your petitioner, which material had not been purchased, transported or held by it for sale as a food in its then condition, but had been acquired for the sole purpose of using the same, or such parts thereof, as upon inspection by it and the authorized agents of the Secretary of Agriculture, might be found suitable therefor, for the manufacture of process or renovated butter. (For said libels see Rec. p. 1 to 13, inc.)

Petitioner claimed the material, denied the adulteration, and prayed for a definite statement or bill of particulars as to what sort of matter was intended to be relied upon as constituting the adulteration; and as to whether all of the containers seized were claimed to be adulterated; and if not, which ones? No ruling was had on the motion, no bill of particulars furnished claimant, nor any more definite statement made. In February 1942, the cases were consolidated for trial. On October 4th, 1943, an order was made by the District Judge that the Marshal deliver the butter to the claimant for renovation, the identity of the several lots to be preserved and the custody of the Court to be maintained, and provision being made for the taking of samples by both sides before and after renovation, all at the expense of claimant; jurisdiction was retained to dispose of the butter afterwards as if the order had not been granted. (Rec. p. 40.) The United States petitioned the Circuit Court of Appeals for a writ of mandamus to compel the District Judge to vacate the order as being without

authority of law and to set a date certain for the trial of the case.

The majority of the Circuit Court of Appeals, (Waller, Circuit Judge, dissenting), held in effect, that the order was unauthorized prior to a decree of condemnation, and that the District Judge should rule on the motion for a more definite statement and bring the matter to a final trial. (See *In re: United States*, C.C.A. 5th Circuit, 140 Fed. 2d 19).

After the ruling of the Circuit Court of Appeals on the petition for mandamus, the District Attorney filed what is termed an amendment to the complaint, (shown by Rec. p. 55), which did not meet the demand for the bill of particulars.

On January 13th, 1944, the petitioner answered the libels, setting up its claim to the seized articles, denying all allegations, conclusions and arguments therein to the effect that the said butter was or is adulterated as alleged, and further alleging that the claimant was a manufacturer of process or renovated butter under Federal license pursuant to the Renovated Butter Act, and had been so engaged for a period of 20 years at the time when the respective lots of butter involved were caused to be libelled by the Federal Security Agency; and that said butter was acquired, transported and held solely for the purpose of utilizing the same, or such part thereof as might be suitable, for the manufacture of process or renovated butter in the usual course of its business in conformity to the Renovated Butter Act and the regulations promulgated by the Secretary of Agriculture of the United States, and under inspection of such raw materials and the finished product as the Secretary of Agriculture might cause to be made; and that the same was not acquired, transported, or held as food in its then condition, but only for use as such raw material; that under the provisions of the Renovated Butter Act the

United States Secretary of Agriculture had the power and it was his duty to ascertain whether or not materials used in the manufacture of such process or renovated butter were or would be deleterious to health, or unwholesome in the finished product; and that the libel or complaint was caused to be filed and the proceedings in each of said cases instituted and prosecuted solely at the instance and by authority of the Federal Security Agency, or the Administrator, and not at the instance or by authority of the Secretary of Agriculture; and that the Court had no jurisdiction or authority to condemn said raw material under the Federal Food, Drug and Cosmetic act. (Rec. p. 58.)

On June 27th, 1944, petitioner filed its verified motion to dismiss the libels, setting up substantially the same grounds as contained in its answer. (Rec. p. 63.)

After hearing the motion the District Court on March 24th, 1944, entered an order that said libels in the respective cases be dismissed and that the butter seized be delivered to the claimant. (Rec. p. 66.)

The United States appealed to the Circuit Court of Appeals for the Fifth Circuit, which court reversed the District Court on March 27th, 1945. Thereafter, within due time, petitioner filed a motion for a rehearing which said motion was overruled and denied by said court on May 5th, 1945. (Rec. pp. 87 to 95.)

It is the contention of the petitioner, which was upheld by the District Court that the regulation of the manufacture of process or renovated butter, and the materials entering into the same, is controlled by the special Act of Congress herein referred to as the Renovated Butter Act, approved May 9th, 1902, 32 Stat. 193-197, which Act was amended by the Act approved August 10th, 1912, entitled "An act for making appropriations for the Department of Agriculture for the fiscal year ending June 30th, 1919," (37 Stat. 273), making all parts of the Act providing for

inspection of meats for exportation approved August 30th, 1890, Chap. 839, 26 Stat. 414, and of the Act to provide for the inspection of live cattle, hogs, carcasses and products thereof, which are the subject of Interstate Commerce, approved March 3rd, 1891, Chap. 555, 26 Stat. 108-109, and of amendment thereto approved March 2nd, 1895, Chap. 169, Sec. 1, 28 Stat. 732, which are applicable to the subject and purposes discovered in Sec. ~~232~~²³¹, applicable to process or renovated butter, and that the sanitary provisions for slaughtering, meat canning, or similar establishment, as set forth in the Act of June 30th, 1906, Chap. 3913, 34 Stat. 676, shall be extended to cover renovated butter factories under such regulations as the Secretary of Agriculture may prescribe. (I.R.C. Sec. 2327 (b) (c)).

The Renovated Butter Act was readopted as Sections 2320-2327 of the Internal Revenue Code, February 10th, 1939.

Pursuant to the authority conferred by the Act the Secretary of Agriculture and the Secretary of the Treasury promulgated comprehensive and detailed regulations pertaining to the manufacture of process or renovated butter, the inspection of the raw material, and of the finished product as well as the sanitary condition of the factories and employees.

The Renovated Butter Act, as now contained in the Internal Revenue Code, and the regulations so promulgated are set out in the appendix hereto.

II.

OPINION BELOW

No opinion was rendered by the District Court other than the expression of its opinion that the motion of complainant to dismiss the libel was well taken. (Rec. p. 81).

The opinion of the Circuit Court of Appeals is reported in 148 Fed. 2d 365, wherein that Court, quoting in part from *Cloverleaf Butter Company v. Patterson*, 315 U. S.

148, 62 Sup. Ct. 491, the Federal Food, Drug & Cosmetic Act, held that: "It (petitioner) does, indeed, show that the renovating process is well adapted to remove all impurities, that renovated butter is good butter, that all packing stock has to be renovated, that all of it comes into the plant more or less adulterated with extraneous and deleterious substances in it, or otherwise unfit in its then condition for human food, and that if all packing stock were to be condemned, because of not fit for human food, no matter how slight the adulteration, the renovated food industry could not survive. But these considerations are for Congress, and if Congress had intended to take packing stock butter out of the Food and Drug Act, it could have very easily done so, even by amending the statutory definition of food, to include materials that go into the finished product, or by expressly excluding from the Act renovated butter."

The Congress did not write such a specific exception because it was not necessary. The general law known as the Food, Drug and Cosmetic Act did not repeal nor modify the special law known as the Renovated Butter Act.

Congress was entirely familiar with the rule as declared by the Court below in its opinion as follows:

"Implied repeal or limitation of one Act by another is never favored. It is not for the courts, unless the conflict between the two Acts is inescapable and compelling, to exclude from the coverage of an Act matters which its terms expressly include, on the theory that another Act whose general purpose seems inconsistent, has impliedly repealed or limited the Act under review. Only where it is found that it is not possible for both to co-exist can one Act be held to repeal or limit another, and then only with respect to the precise point of conflict."

III.

JURISDICTION.

The jurisdiction of this Honorable Court is invoked under Section 240 of the Judicial Code as amended by Act

of February 13th, 1925, Chap. 229, Sec. 1, 43 Stat. 938, Sub. Secs. (a) and (b), separately and severally of United States Code, Title 28, Sec 347 (U.S.C.A. Sec 347), and Rule 38 of the revised Rules of the Supreme Court of the United States, adopted February 13th, 1939, Amended March 25, 1940, October 21st, 1941, and May 26, 1941.

IV.

QUESTIONS PRESENTED

The questions are:

- (1) Did the Congress by the adoption of the general act known as the Food, Drug and Cosmetics Act of 1938 intend to repeal, limit or modify the special act known as the Renovated Butter Act passed in 1902, amended in 1912, substantially reenacted in the Revenue Code of 1939—about one year after passage of the Food, Drug and Cosmetics Act in 1939?
- (2) Did Congress by the passage of the general law known as the Food, Drug and Cosmetic Act of 1938 intend to strip the Secretary of Agriculture of his power given him under and by virtue of the special Renovated Butter Act of 1902—under which the Secretary had promulgated detailed regulations from time to time governing and controlling the industry, and under which he had exercised the exclusive control of the manufacture of process or renovated butter and supervision of same for almost a half century?
- (3) Did the Congress by the passage of the general law known as the Food, Drug and Cosmetic Act of 1938 intend to delegate powers theretofore committed to the Secretary of Agriculture to another, separate and independent governmental agency or bureau relating to the duties as to inspection of raw materials to be used in the manufacture of renovated or process butter, or to give such other agency power to seize such raw material while in the process of manufacture or held for that sole purpose before the Secretary of Agriculture had an opportunity to inspect same as

well as after the Secretary had made such inspection and had passed or approved such raw material as suitable to be renovated?

(4) Did the Congress intend by the adoption of the Food, Drug and Cosmetic Act of 1938 to change the tests of suitability of raw material to be used in the manufacture of process butter; or to say that such raw material was a "component part" of the finished product, notwithstanding the part that enters renovated butter is not the packing stock but only the clarified, cleansed, melted and pasteurized oil extracted from such packing stock, or to provide that such raw material or packing stock if in "whole or in part" was affected with the slightest contamination or unsuitability for food in its then condition must be condemned by the Security Administrator; and the manufacture of process butter from such material be prohibited, or the right to process the same be denied, even though such manufacture or processing was done under the eye of the Secretary of Agriculture?

V.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

That the matter presented is of vital importance to the process or renovated butter industry, the producers of the raw materials, and the consuming public.

Under the construction of the Renovated Butter Act and the Federal Food, Drug and Cosmetic Act, as made by the Circuit Court of Appeals, the process or renovated butter industry cannot survive.

Under the Renovated Butter Act and the regulations promulgated in pursuance thereof, the Secretary of Agriculture is authorized and required to make a rigid sanitary inspection of all factories where process or renovated butter is manufactured, packed or prepared for market, and of the products thereof and the materials going into

the manufacture of the same; and is authorized to make all needful regulations for carrying the law into effect; he has power to ascertain whether or not materials used in the manufacture of process or renovated butter are deleterious to health or unwholesome in the finished product, and in case deleterious or unwholesome materials are found to be used in product intended for exportation or interstate shipment, or in the course of exportation or interstate shipment, he has power to confiscate the same.

The test under that Act of the suitability of the raw material is the wholesomeness or freedom from substances deleterious to health of the finished product.

Whereas, under the Federal Food, Drug and Cosmetic Act, (June 25th, 1938, Chap. 675), the term "food" means: (1) articles used for food or drink for man or other animals, (2) chewing gum, (3) articles used for components of any such article. (U.S.C.A. Title 21, Sec. 321, Appendix). A food shall be deemed to be adulterated * * *

(4) if it consists in whole or in part of any filthy, or decomposed substances, or if it is otherwise unfit for food. (U.S.C.A. Title 21, Sec. 342 (a)). Any article of food that is adulterated or misbranded, when introduced into or while in interstate commerce, shall be liable to be proceeded against, while in interstate commerce, or at any time thereafter, on libel of information and condemned in any district court of the United States within the jurisdiction of which the article is found. (U.S.C.A. Title 21, Sec. 334 (a)). Any food condemned under this section shall, after entry of the decree, be disposed of by destruction or sale as the court may, in accordance with the provisions of this section, direct; provided that after entry of the decree and upon the payment of the costs of such proceedings and the execution of a good and sufficient bond, the court may by order direct that such article be delivered to the owner thereof to be destroyed or brought into compliance with

the provisions of this chapter under the supervision of an officer or employee duly designated by the Administrator, and the expenses of such supervision shall be paid by the person obtaining release of the article under bond. (U. S. C. A. Title 21, Sec. 334 (d)). The introduction or delivery for introduction into interstate commerce of any food, that is adulterated or misbranded is prohibited. (U.S.C.A. Title 21, Sec. 331). Any person violating any of the provisions of Section 331 shall be guilty of a misdemeanor and shall on conviction thereof be subject to imprisonment for not more than one year, or a fine of not more than \$1,000, or both such imprisonment and fine; and for conviction of subsequent violation may be imprisoned for not more than three years. (U.S.C.A. Title 21, Sec. 333—U. S. v. Dotterweich, 320 U.S. 277; 64 S. Ct. 134.)

The Federal Food, Drug and Cosmetic Act has been construed by a majority of decisions as prohibiting the interstate shipment of food which consists in whole or in part of any filthy, putrid or decomposed substance, irrespective of whether it was injurious to health. (United States vs. 1851 Cartons Frozen Whiting, labelled in part, "H. & G. Farms, Whiting Frozen Fish; C.C.A. 10th Circuit, 146 Fed. 760; Anderson vs. United States, C.C.A. 9th Circuit, 284 Fed. 542; United States vs. 200 Cases Adulterated Tomato Ketchup, 211 Fed. 780; and United States v. Krumm, 269 Fed. 848; United States v. 200 Cases, more or less, of Canned Salmon, 289 Fed. 157.)

The Act is further construed as not recognizing any intended processing or cleansing of raw material, component parts of food, and the intention to process the product so as to make it pure before it reached the public is declared immaterial. United States v. 52 Drums, Maple Syrup, C.C.A. 2nd Circuit, 110 Fed. 2d 914. Processing prior to order of condemnation, even for the purpose of

determining whether or not the product is adulterated, is unauthorized. In re: United States, C.C.A. 5th Circuit, 140 Fed. 2d 19.

1. That the Circuit Court of Appeals for the Fifth Circuit has decided an important question of Federal law with respect to the applicability of the Federal Food, Drug and Cosmetic Act to the raw material — packing stock butter—transported and held by a manufacturer for the sole and exclusive purpose of manufacturing same into process or renovated butter under the provisions of the Renovated Butter Act and regulations promulgated thereunder which has not been but should be settled by this court.

2. That the Circuit Court of Appeals for the Fifth Circuit has decided a Federal question in a way probably in conflict with applicable decisions of this Court with respect to construction of statutes as declared in many cases among which are, *Sorrells v. United States*, 287 U.S. 435, 53 S. Ct. 214; *Anderson v. Pacific Coast S.S. Co.*, 225 U.S. 187, 32 S. Ct. 626; *Leavenworth L. G. & R. Co. vs. U. S.*, 92 U.S. 733; *Missouri K. & T. R.R. Co. v. U. S.*, 92 U.S. 760; In re *Louisville Underwriters*, 134 U.S. 488, 10 S. Ct. 587; *Rogers v. U. S.*, 185 U.S. 83, 32 S. Ct. 582; *Ex Parte United States*, 226 U.S. 420; *Washington v. Miller*, 235 U.S. 422; *Ex Parte Crow Dog*, 109 U.S. 556; *Townsend v. Little*, 109 U.S. 504.

3. That the Circuit Court of Appeals for the Fifth Circuit has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervision.

VI.

SPECIFICATION OF ERRORS TO BE URGED.

The Circuit Court of Appeals erred—

1. In reversing the decree of the United States District Court for the Northern District of Alabama.

2. In holding, in effect, that the Renovated Butter Act

with its tests, standards and procedure was not the controlling statute in the case.

3. In holding, in effect, that packing stock butter, not transported or held by a manufacturer of process or renovated butter for sale in its then condition, but merely as raw material to be prepared and processed under the Renovated Butter Act and regulations promulgated thereunder, and the inspection, determination and control of the Secretary of Agriculture, was subject to seizure under the Federal Food, Drug and Cosmetic Act.

4. In holding that all that was intended by the Renovated Butter Act was that renovated butter could be made out of stock which, while not in its then state fit for human consumption, was yet not so unfit as to require its condemnation, the Circuit Court of Appeals pretermitted the construction of the Federal Drug, Food and Cosmetic Act by the great majority of the courts that "adulteration" as defined in that Act rendered raw materials subject to seizure and condemnation regardless of the purpose and ability of the manufacturer to remove all impurities before offering for sale in the finished product.

5. The Circuit Court of Appeals erred in holding that Congress, while authorizing the making of renovated butter, left to proper administration the supervision of the ingredients whenever they were of such character as to be deemed deleterious, otherwise unfit for foods, and holding in effect that such administration and supervision should be had under the Federal Food and Drug Act instead of the administration and supervision on the part of the United States Secretary of Agriculture as required by the Renovated Butter Act.

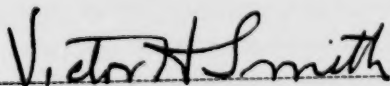
WHEREFORE, your petitioner prays that a writ of certiorari issue under the seal of this Court, directed to the United States Circuit Court of Appeals for the Fifth Circuit, commanding that court to certify and send to this

Court a full and complete transcript of the record and of the proceedings of said court had in the case numbered 11040, United States of America, Appellant vs. 24 Cans containing a total of approximately 1833 pounds of ladeled butter in possession of Cloverleaf Butter Company, Birmingham, Alabama, et al, Appellees, to the end that this cause may be reviewed and determined by this Court as provided for by the Statutes of the United States; and that the judgment therein of said United States Circuit Court of Appeals for the Fifth Circuit be reversed by this Court, and for such other relief as to this Court may seem proper. July 28, 1945.

CLOVERLEAF BUTTER COMPANY, *Petitioner*

By _____
ERLE PETTUS

HORACE C. WILKINSON



VICTOR H. SMITH

All of Birmingham, Ala.
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APPENDIX

RENOVATED BUTTER ACT (INTERNAL
REVENUE CODE, SECTIONS 2320, ET SEQ.)UNITED STATES DEPARTMENT OF AGRICULTURE
BUREAU OF DAIRY INDUSTRYREGULATIONS FOR CARRYING INTO EFFECT
THE PROCESS OR RENOVATED
BUTTER ACT.INTERNAL REVENUE CODE
SUBCHAPTER B—ADULTERATED AND PROCESS
OR RENOVATED BUTTER

SEC. 2320. DEFINITIONS.

(a) Butter.—For the purpose of this chapter and sections 3206, and 3207, the word "butter" shall be understood to mean the food product usually known as butter, and which is made exclusively from milk or cream, or both, with or without common salt, and with or without additional coloring matter.

(b) Adulterated Butter.—"Adulterated butter" is defined to mean a grade of butter produced by mixing, reworking, rechurning in milk or cream, refining, or in any way producing a uniform, purified, or improved product from different lots or parcels of melted or unmelted butter or butter fat, in which any acid, alkali, chemical, or any substance whatever is introduced or used for the purpose or with the effect of deodorizing or removing therefrom rancidity, or any butter or butter fat with which there is mixed any substance foreign to butter as defined in subsection (a), with intent or effect of cheapening in cost the product or any butter in the manufacture or manipulation of which any process or material is used with intent or

effect of causing the absorption of abnormal quantities of water, milk, or cream.

(c) **Process or Renovated Butter.**—"Process butter" or "renovated butter" is defined to mean butter which has been subjected to any process by which it is melted, clarified or refined and made to resemble genuine butter, always excepting "adulterated butter" as defined by subsection (b).

SEC. 2321. TAX.

(a) **Rate.**—

(1) **Adulterated butter.**—Upon adulterated butter, when manufactured or sold or removed for consumption or use, there shall be assessed and collected a tax of 10 cents per pound, and any fractional part of a pound shall be taxed as a pound.

(2) **Process or renovated butter.**—Upon process or renovated butter, when manufactured or sold or removed for consumption or use, there shall be assessed and collected a tax of one-fourth of 1 cent per pound, and any fractional part of a pound shall be taxed as a pound.

(b) **By Whom Paid.**—The tax to be levied by subsection (a) shall be paid by the manufacturer.

(c) **How Paid.**—

(1) **Stamps.**—The tax to be levied by subsection (a) shall be represented by coupon stamps.

(2) **Assessment.**—

For assessment in case of omitted taxes, see section 3311.

(d) **Special Tax.**—

(1) **Manufacturers of adulterated and process or renovated butter.**—

For special tax on manufacturers of adulterated and process or renovated butter, see subsection (a) of section 3206.

(2) Wholesale dealers and retail dealers in adulterated butter.—

For special tax on wholesale dealers and retail dealers in adulterated butter, see subsections (b) and (c) of section 3206.

SEC. 2322. MANUFACTURERS.

(a) Definition.—Every person who engages in the production of process or renovated butter or adulterated butter as a business shall be considered to be a manufacturer thereof.

(b) Packing, Stamping, and Selling Requirements.—

(1) Adulterated butter.—All adulterated butter shall be packed by the manufacturer thereof in firkins, tubs, or other wooden, tin-plate, or paper packages not before used for that purpose, containing, or encased in a manufacturer's package made from any of such materials of, not less than ten pounds, and marked, stamped, and branded as the Commissioner, with the approval of the Secretary, shall prescribe, and all sales made by manufacturers of adulterated butter shall be in original, stamped packages. Every manufacturer of adulterated butter shall securely affix, by pasting, on each package containing adulterated butter manufactured by him a label on which shall be printed, besides the number of the manufactory and the district and State in which it is situated, these words: "Notice.—That the manufacturer of the adulterated butter herein contained has complied with all the requirements of law. Every person is cautioned not to use either this package again or the stamp thereon, nor to remove the contents of this package without destroying said stamp, under the penalty provided by law in such cases."

(2) Process or renovated butter.—

For marking process or renovated butter, see section 2325. (Below.)

(c) **Book and Returns**.—Every manufacturer of process or renovated butter or adulterated butter shall file with the collector of the district in which his manufactory is located such notices and inventories, shall keep such books and render such returns of material and products, and conduct his business under such surveillance of officers and agents as the Commissioner, with the approval of the Secretary, may by regulation require.

(d) **Factory Number and Signs**.—Every manufacturer of process or renovated butter or adulterated butter shall put up such signs and affix such number to his factory as the Commissioner, with the approval of the Secretary, may by regulation require.

(e) **Bonds**.—Every manufacturer of process or renovated butter or adulterated butter shall file with the collector of the district in which his manufactory is located such bonds as the Commissioner, with the approval of the Secretary, may by regulation require. But the bond required of such manufacturer shall be with sureties satisfactory to the collector, and in a penal sum of not less than \$500; and the sum of said bond may be increased from time to time and additional sureties required at the discretion of the collector or under instructions of the Commissioner.

SEC. 2323. DEALERS IN ADULTERATED BUTTER.

(a) **Dealer Defined**.—Every person who sells adulterated butter shall be regarded as a dealer in adulterated butter.

(b) **Retail Dealer Defined**.—Every person who sells adulterated butter in less quantities than ten pounds at one time shall be regarded as a retail dealer in adulterated butter.

(c) **Selling Requirements**.—Dealers in adulterated butter must sell only original or from original stamped pack-

ages, and when such original stamped packages are broken the adulterated butter sold from same shall be placed in suitable wooden, tin-plate, or paper packages, which shall be marked and branded as the Commissioner, with the approval of the Secretary, shall prescribe.

SEC. 2324. BOOKS AND RETURNS OF WHOLESALE DEALERS IN ADULTERATED AND PROCESS OR RENOVATED BUTTER.

Wholesale dealers in process, renovated, or adulterated butter shall keep such books and render such returns in relation thereto as the Commissioner, with the approval of the Secretary, may, by regulation, require; and such books shall be open at all times to the inspection of any internal revenue officer or agent.

SEC. 2325. INSPECTION, MANUFACTURE, STORAGE, AND MARKING OF PROCESS OR RENOVATED BUTTER.

The Secretary of Agriculture is authorized and required to cause a rigid sanitary inspection to be made, at such times as he may deem proper or necessary, of all factories and storehouses where process or renovated butter is manufactured, packed, or prepared for market, and of the products thereof and materials going into the manufacture of the same. All process or renovated butter and the packages containing the same shall be marked with the words "Renovated Butter" or "Process Butter" and by such other marks, labels, or brands and in such manner as may be prescribed by the Secretary of Agriculture, and no process or renovated butter shall be shipped or transported from its place of manufacture into any other State or Territory or the District of Columbia, or to any foreign country, until it has been marked as provided in this section. The Secre-

tary of Agriculture shall make all needful regulations for carrying this section and sections 2326 (c) and 2327 (b) into effect and shall cause to be ascertained and reported from time to time the quantity and quality of process or renovated butter manufactured, and the character and the condition of the material from which it is made. And he shall also have power to ascertain whether or not materials used in the manufacture of said process or renovated butter are deleterious to health or unwholesome in the finished product, and in case such deleterious or unwholesome materials are found to be used in product intended for exportation or shipment into other States or in course of exportation or shipment he shall have power to confiscate the same.

SEC. 2326. PENALTIES.

(a) Adulterated Butter.—

(1) False branding; sale, packing, or stamping in violation of law.—Every person who knowingly sells or offers for sale, or delivers or offers to deliver, any adulterated butter in any other form than in new wooden, tin-plate, or paper packages as described in subsection (c) of section 2323, or who packs in any package any adulterated butter in any manner contrary to law, or who falsely brands any package or affixes a stamp on any package denoting a less amount of tax than that required by law, shall be fined for each offense not more than \$1,000 and be imprisoned not more than two years.

(2) Omission or removal of lable.—Every manufacturer of adulterated butter who neglects to affix the label required under paragraph (1) of subsection (b) of section 2322 to any package containing adulterated butter made by him, or sold or offered for sale for or by him, and every person who removes any such label so affixed from any

such package shall be fined \$50 for each package in respect to which such offense is committed.

(b) Failure of Wholesale Dealers to Keep or Permit Inspection of Books, or to Render Returns.—Any person who wilfully violates any of the provisions of section 2324 shall for each such offense be fined not less than \$50 and not exceeding \$500, and imprisoned not less than thirty days nor more than six months.

(c) Failure to Comply With Provisions Relating to the Manufacture, Storage, and Marking of Process or Renovated Butter.—Any person, firm, or corporation violating any of the provisions of section 2325 shall be deemed guilty of a misdemeanor and on conviction thereof shall be punished by a fine of not less than \$50 nor more than \$500 or by imprisonment not less than one month nor more than six months, or by both said punishments, in the discretion of the court.

SEC. 2327. OTHER LAWS APPLICABLE.

(a) Oleomargarine.—The provisions of sections 2301 (c) (2), 2305 to 2311 inclusive (except subsections (a), (b), and (h) of section 2308), and section 3791 (a) (1), shall apply to manufacturers of adulterated butter to an extent necessary to enforce the marking, branding, identification, and regulation of the exportation and importation of adulterated butter.

(b) Inspection of Live Cattle and Meat.—All parts of an act providing for an inspection of meats for exportation, approved August 30, 1890, c. 839, 26 Stat. 414, and of an Act to provide for the inspection of live cattle, hogs, and the carcasses and products thereof which are the subjects of interstate commerce, approved March 3, 1891, c. 555, 26 Stat. 1089, and of amendment thereto approved March 2, 1895, c. 169, 1, 28 Stat. 732, which are applicable to the

subjects and purposes described in section 2325 shall apply to process or renovated butter.

(c) Slaughtering and Meat Canning.—The sanitary provisions for slaughtering, meat canning, or similar establishments as set forth in the act of June 30, 1906, c. 3913, 34 Stat. 676, shall be extended to cover renovated butter factories as defined in this subchapter, under such regulations as the Secretary of Agriculture may prescribe.

(d) Tobacco and Snuff.—The provisions of law governing the engraving, issuing, sale, accountability, effacement, and destruction of stamps relating to tobacco and snuff, as far as applicable, shall apply to the stamps provided in section 2321 (c) (1).

B. D. I. ORDER NO. 1—REVISED**Issued December 24, 1936****UNITED STATES DEPARTMENT OF AGRICULTURE****BUREAU OF DAIRY INDUSTRY****REGULATIONS FOR CARRYING INTO EFFECT
THE PROCESS OR RENOVATED
BUTTER ACT****INTRODUCTION**

Under authority conferred upon the Secretary of Agriculture by the act of Congress approved May 9, 1902, entitled "An act to make oleomargarine and other imitation dairy products subject to the laws of any state, or territory, or the District of Columbia, into which they are transported, and to change the tax on oleomargarine, and to impose a tax, provide for the inspection, and regulate the manufacture and sale of certain dairy products, and to amend an act entitled 'An act defining butter, also imposing a tax upon and regulating the manufacture, sale, importation and exportation of oleomargarine approved August 2, 1886' " (32 Stat. 193-197; U.S.C., title 26, sec. 990-997); and by the act of Congress approved August 10, 1912, entitled "An act making appropriations for the Department of Agriculture for the fiscal year ending June 30, 1913" (37 Stat. 273); the following regulations are made and are hereby promulgated, which for purposes of identification are designated B.D.I. Order No. 1—Revised, superseding S.R.A. 1—Bureau Dairying, issued April, 1925; and B.D. Order 1, issued February 14, 1925; which are hereby revoked.

HENRY A. WALLACE,*Secretary of Agriculture.***Washington, D. C., December 24, 1936.**

Regulation 1.—Short Title of Act

For the purpose of these regulations the act entitled "An act to make oleomargarine and other imitation dairy products subject to the laws of any State or Territory or the District of Columbia into which they are transported, and to change the tax on oleomargarine and to impose a tax, provide for the inspection, and regulate the manufacture and sale of certain dairy products, and to amend an act entitled 'An Act Defining Butter,' also imposing a tax upon and regulating the manufacture, sale, importation, and exportation of oleomargarine approved August 2, 1886," approved May 9, 1902 (32 Stat. 193-199; U. S. C., title 26, sec. 990-997, as amended by the act of August 10, 1912 (37 Stat. 273, U. S. C., title 26, sec. 997 (c)), entitled "An act making appropriations for the Department of Agriculture for the fiscal year ending June 30, 1913," shall be known and referred to as the Process or Renovated Butter Act. The Chief of the Bureau of Dairy Industry is charged, under the direction of the Secretary, with the administration of these regulations.

Regulation 2.—Definitions

For the purpose of these regulations the following words, phrases, names, and terms shall be construed, respectively, to mean:

Section 1. *The Meat Inspection Act.*—The act of June 30, 1906, entitled "An act making appropriations for the Department of Agriculture for the fiscal year ending June thirtieth, nineteen hundred and seven" (34 Stat. 674-679) as reenacted by act of March 4, 1907 (34 Stat. 1260-1265; U. S. C., title 21, secs. 71 to 94) , entitled "An act making appropriations for the Department of Agriculture for the fiscal year ending June thirtieth, nineteen hundred and eight," the sanitary provisions of which are made applicable to renovated-butter factories by act of Aug. 10, 1912

(37 Stat. 273; U. S. C., titles 26, sec. 997 (c), entitled "An act making appropriations for the Department of Agriculture for the fiscal year ending June 30, 1913."

Sec. 2. *Department*.—The United States Department of Agriculture.

Sec. 3. *Bureau*.—The Bureau of Dairy Industry of the United States Department of Agriculture.

Sec. 4. *Chief of Bureau*.—The administrative head of the Bureau of Dairy Industry of the United States Department of Agriculture.

Sec. 5. *Inspector*.—Any Department officer or employee authorized to perform any duties in connection with the administration of these regulations.

Sec. 6. *Person*.—Natural persons, individuals, firms, partnerships, corporations, companies, societies, and associations, and agent, broker, officer, employee, or member thereof. This term shall import both the plural and the singular as the case may be.

Sec. 7. *Butter*.—The food product usually known as butter, and which is made exclusively from milk or cream, or both, with or without common salt, and with or without additional coloring matter.

Sec. 8. *Par. 1.—Process or renovated butter*.—Butter which has been subjected to any process by which it is melted, clarified, or refined and made to resemble genuine butter, always excepting adulterated butter as defined in section 4 of the act of May 9, 1902 (32 Stat. 195).

Par. 2. Process or renovated butter must contain at least 80 per cent by weight of milk fat.

Par. 3. The term "process butter" and "renovated butter" are used synonymously and it is immaterial whether a manufacturer designates the product "process butter" or "renovated butter."

*Regulation 3.—Sanitation and Sanitary Inspection
of Process or Renovated Butter Factories*

Section 1. For the purpose of effectively administering the Process or Renovated Butter Act, rigid sanitary inspections will be made at such times and as often as necessary of all process or renovated butter factories and storehouses where process or renovated butter is manufactured, packed, or prepared for market.

Sec. 2. Inspectors shall have access at all times by day or night to every part of any process or renovated butter factory or storehouse.

Sec. 3. Process or renovated butter factories or storehouses where process or renovated butter is manufactured, packed, prepared, or handled shall be maintained in a sanitary condition, and to this end the requirements of sections 4 to 12 of this regulation shall be complied with.

Sec. 4. Factories where process or renovated butter is manufactured, packed, or prepared for market shall be suitably lighted, screened, and ventilated in order that sanitary conditions may be maintained. Such factories shall be supplied with proper and sufficient drainage, having proper traps or other approved sewer connections. Rooms shall be kept reasonably free from steam and other vapors by heating or proper ventilation, and all work in such factories shall be performed in a sanitary manner.

Sec. 5. All floors, ceilings, walls, pillars, partitions, platforms, stairways, etc., shall be kept in a sanitary condition and when necessary shall be scraped, washed, painted or otherwise treated as required. Where floors or others parts of the building, or tables or other parts of the equipment, are so old or in such poor condition that they cannot readily be made sanitary, they shall be removed and replaced with suitable material. Walks, platforms, and approaches leading into factories shall be kept clean.

Sec. 6. All churns, melting tanks, workers, cans, vats, blowing tanks, settling tanks, trucks, trays and other receptacles, chutes, platforms, racks, tables, and all utensils, machinery, and other equipment used in preparing, moving, cutting, chopping, and otherwise handling the materials used in the manufacture of process or renovated butter, and in all processes of manufacturing of process or renovated butter or its preparation for market, shall be kept in a sanitary condition.

Sec. 7. All factories in which milk, cream, or mixtures containing milk or cream are pumped or conducted through pipes shall be equipped with sanitary pumps, pipes, and fittings. Pumps shall be so constructed that all parts coming in contact with milk, cream, or mixtures containing milk or cream shall be made of non-corrosive metal, or shall be suitably nickled, tinned, or coated with other approved metal, and such parts shall be accessible for cleaning. Pipes shall have smooth outer and inner surfaces coated with nickel, tin, or other approved metal, and fittings shall have smooth outer and inner surfaces coated with nickel, tin, or other approved metal, and shall be of such design that no pockets or recesses occur on the inside between the pipes and fittings: *Provided, however,* That open conductors having smooth outer and inner surfaces coated with nickel, tin, or other approved metal may be used in place of pipe. All pumps, fittings, and conductors shall be kept in a sanitary condition.

Sec. 8. Managers of process or renovated butter factories shall require employees to be cleanly. Aprons, smocks, and other outer clothing worn by employees who handle or in any way come in contact with the process or renovated butter or any ingredient entering into the manufacture of same shall be of material that can be made sanitary by washing, and only clean garments shall be worn. All persons who handle process or renovated butter or any mate-

rial entering into the manufacture of same shall be required to keep their hands clean, and they shall be required also to pay particular attention to the cleanliness of their boots and shoes.

Sec. 9. No person affected with tuberculosis or other communicable disease shall be employed in any factory where process or renovated butter is manufactured, and any employees who may be suspected of being so affected shall be reported by the inspector to the manager of the factory and to the Chief of Bureau.

Sec. 10. All water closets, toilet rooms, and dressing rooms shall be entirely separated from the compartments in which process or renovated butter is manufactured, prepared, packed, stored, or otherwise handled; and where such rooms open into compartments in which process or renovated butter is handled they shall be provided with properly ventilated vestibules and automatically closing doors. They shall be conveniently located, sufficient in number, ample in size, and fitted with modern lavatory accommodations including toilet paper, soap, running hot and cold water, etc., and shall be properly lighted, suitably ventilated, and kept clean and sanitary.

Sec. 11. The factory in which process or renovated butter is manufactured, prepared, packed, stored, or otherwise handled shall be kept free from odors coming from poultry rooms, egg rooms, toilet rooms, catch basins, or any other objectionable source, and shall be kept free from flies and other vermin; and all rooms or compartments shall be provided with cuspidors so designed as to prevent them from being upset, and made of such material and construction as to be readily disinfected, and employees who expectorate shall be required to use them.

*Regulation 4.—Sanitation and Sanitary Inspection of
Products of and Material From Which Process
or Renovated Butter is Manufactured*

Section 1. "Rigid" sanitary inspections will also be made of the character and condition of the materials going into the manufacture of process or renovated butter and of the quantity and quality of process or renovated butter manufactured.

Sec. 2. Due care must be taken to prevent process or renovated butter, in any stage of its manufacture, from falling on the floor, and in the event of its having so fallen, the soiled portion shall not be used. Butterfat collected from floors, drains, or catch basins shall not be used in the manufacture of process or renovated butter.

Sec. 3. Only good, clean, and wholesome water and ice shall be used in the preparation and manufacture of process or renovated butter and, whenever there is any doubt regarding the purity of the water supply, the facts shall be reported to the Chief of Bureau.

Sec. 4. Air used in blowing or aerating the oil during the process of manufacture shall be pure and clean, and shall be taken from the outside of the building; and in order to prevent the use of air which is contaminated with dust, smoke, objectionable odors, etc., some approved method of purification, such as washing or filtering through cotton, shall be provided.

Sec. 5. In manufacturing process or renovated butter all cream, milk or skim milk used must be pasteurized.

Sec. 6. All milk, skim milk, dried milk, dried skim milk, cream, and analogous substances used in the making of process or renovated butter shall be kept, stored, and handled in a sanitary manner in accordance with accepted dairy practices.

Sec. 7. All other materials including salt and butter color entering into the manufacture of process or renovated butter shall also be kept, stored, and handled in a sanitary manner.

Sec. 8. All cartons, parchment wrappers, liners, packages, tubs, cans, tins, or other containers used for packing process or renovated butter shall be stored, kept, and handled in a sanitary manner.

Regulation 5.—The Marking, Labeling and Branding of Process or Renovated Butter

Section 1. (a) Before removal from the factory each package of process or renovated butter shall have legibly printed or stenciled on one of its sides the legend "Process Butter" or "Renovated Butter"; also the factory number, district, and State, and the net weight, in the following manner:

PROCESS BUTTER

Factory No. 2, 2d Dist. New York
Net Weight, 60 lbs.

(b) The legend "Process Butter" or "Renovated Butter" shall be in boldface gothic letters not less than three-quarters of an inch square and the other words and figures not less than half an inch square. The color of the legend shall be in strong contrast to that of the package.

Sec. 2. The wrappers, cartons, or other containers in which prints or rolls are placed shall be branded with the legend "Process Butter" or "Renovated Butter" in boldface gothic letters, not less than three-eighths of an inch square. Such legend shall form a strong contrast to the color of the wrapper or container. No other marks shall be made on the side of the wrapper or container on which the legend is placed.

Sec. 3. Each package must show the manufacturer's name and address or the factory number, district, and

State, and bear a plain and conspicuous statement of the net weight of contents. Such wrappers, cartons, or other containers shall bear no pictorial or other representation which may create the impression that the article is butter as defined by the act of Congress of March 4, 1923.

Sec. 4. The top surface of solid-packed goods shall be imprinted with the legend "Process Butter" or "Renovated Butter" in plain gothic letters not less than half an inch square, and impressed at least an eighth of an inch deep. Prints and rolls shall be similarly impressed with letters not less than three-eighths of an inch square. The surface impression may be omitted from prints and rolls of less than a pound unit weight, provided there is compliance with all other requirements.

Sec. 5. With the exception of shipping marks, any marks, brands, labels, other than those prescribed by these regulations, shall be approved by the Secretary of Agriculture before they are used on packages of process or renovated butter.

Sec. 6. Approved copies of all marks, brands, or labels shall be retained at the manufacturers' registered place of business, available for inspection by an inspector.

Sec. 7. Every manufacturer of process or renovated butter who fails to brand the product and the containers in which it is packed is punishable by a fine of not less than \$50 nor more than \$500 or by imprisonment for not less than 1 month nor more than 6 months, or both. Every person who removes any such brands from any package of process or renovated butter is punishable by a fine not exceeding \$1,000 or imprisonment not exceeding 1 year, or both, as provided in section 4, act of March 3, 1891, made applicable by section 5, act of May 9, 1902.

Sec. 8. Misbranding any article of food intended for interstate commerce, or manufactured or offered for sale in any Territory of the United States or the District of

Columbia, is prohibited. That for the purposes of the Food and Drugs Act an article shall also be deemed to be misbranded in the case of food—

(1) If it be an imitation of, or offered for sale under the distinctive name of another article;

(2) If it be labeled or branded so as to deceive or mislead the purchaser, or purports to be a foreign product when not so, or if the contents of the package, as originally put up, shall have been removed in whole or in part and other contents shall have been placed in such package;

(3) If in package form, the quantity of the contents be not plainly and conspicuously marked on the outside of the package in terms of weight, measure, or numerical count; or

(4) If the package containing it or its label shall bear any statement, design, or device regarding the ingredients or the substances contained therein, which statement, design, or device shall be false or misleading in any particular.

No provision of these regulations shall be construed so as to relieve any person from compliance with the Federal Food and Drugs Act.

Sec. 9. Inspectors of the Department of Agriculture, appointed for the purpose by the Secretary of Agriculture, are authorized to enter all factories and storehouses where process or renovated butter is manufactured, packed, or prepared for market for the purpose of examination or inspection authorized by this act.

Sec. 10. Periodic inspection of each factory shall be made by such inspectors who will submit a complete report to the Chief of Bureau on the sanitation of the premises, the character and condition of the materials used, and the quantity and quality of process or renovated butter produced. The sanitary provisions of the Meat Inspection Act shall apply to the sanitary inspection of process or ren-

ovated butter factories. (See act of Aug. 10, 1912 (37 Stat., 273.)

Sec. 11. Process or renovated butter containing any filthy decomposed, or putrified animal or vegetable substance shall be deemed adulterated under the Foods and Drugs Act.

Sec. 12. The Secretary of Agriculture will determine whether or not materials being used in the manufacture of process or renovated butter will be deleterious to health or unwholesome in the finished product. If any materials which have been so determined to be deleterious to health or unwholesome in the finished product are found to be present in any process or renovated butter, intended for, or in course of, exportation or shipment in interstate commerce, such process or renovated butter will be confiscated, as provided for in regulation 7, section 4 hereof.

Sec. 13. Original packages of process or renovated butter for export shall be stamped and branded as in the case of packages for domestic use and may be covered with cloth, jute, or burlap. The outer covering shall be conspicuously stenciled with the legend "Process Butter" or "Renovated Butter," in boldface gothic letters not less than an inch square, and the words "For Export Only" on the line beneath, in similar letters not less than three-eighths of an inch square.

Sec. 14. Process or renovated butter for export shall be examined by inspectors of the Department of Agriculture, who will issue a certificate as to its purity, quality, and grade and the sufficiency of the stamps and brands. If inspection is not made before the outer coverings are placed upon the packages, the exporter may be required to remove them.

(The foregoing Secs. 1 to 14, have been promulgated by the Commissioner of Internal Revenue and approved

by the Secretary of the Treasury and the Secretary of Agriculture.)

Sec. 15. All marks, brands, or labels, within the meaning of these regulations shall include printed, lithographed, or embossed labels, stickers, seals, wrappers, and receptacles.

Sec. 16. Marks, brands, or labels to be affixed to process or renovated butter intended for export shall in all cases be printed in the English language, but they may also be literally translated into foreign languages.

Sec. 17. No mark, brand, stencil, sticker, label, or seal to be affixed to any tin, carton, wrapper, or other container in which process or renovated butter is placed shall be used until it is approved in its final form by the Chief of Bureau. Triplicates of new trade labels in the form of sketches, proofs, or photographic copies shall be transmitted direct or through inspectors to the Chief of Bureau for approval, and finished trade labels, cartons, or wrappers shall not be prepared in advance of such approval of sketches. After such labels, cartons, or wrappers have been printed, lithographed, or embossed in accordance with the approved sketches or proofs three each of such cartons, labels or wrappers shall be submitted direct or through the inspectors for final approval and filing. Copies of approved labels, cartons, or wrappers shall be kept on file and available for examination by inspectors upon request.

Sec. 18. Trade labels which bear any false or deceptive names shall not be used.

Regulation 6—Reports

Section 1. Each process or renovated butter factory shall furnish to authorized inspectors accurate information as to all matters required in making their reports.

*Regulation 7.—Process or Renovated Butter Intended
for or in the Course of Interstate Com-
merce or for Export*

Section 1. To determine whether or not materials used in the manufacture of process or renovated butter are deleterious to health or unwholesome in the finished product, a sample of such butter shall be taken.

Sec. 2. Such sample shall be drawn in the following manner: A sample will be taken from every package of each lot. However, (A) if a lot includes two or more packages from one *churning*, a sample may be taken from one package only; or (B) if the separate churnings are not indicated, not less than one sample from each 10 tubs may be taken. Additional samples may be taken if, in the opinion of the inspector, such action is necessary to obtain representative samples of such butter.

Sec. 3. The samples thus obtained, properly identified, shall be promptly forwarded to the Department for examination and chemical analysis.

Sec. 4. If such butter is found upon such examination and such chemical analysis to be deleterious to health or unwholesome, and such butter is intended for exportation or shipment into other States, or is in the course of exportation, or in the course of such shipment, the Secretary shall confiscate the same to prevent its use for food purposes. The Secretary may release such butter to its owner for industrial use, upon such conditions as he deems necessary to prevent its use for food purposes.

Sec. 5. Any butter suspected of being process or renovated, or adulterated, wherever found will be sampled as herein provided. The samples thus obtained, properly identified, shall be promptly forwarded to the Department for examination and chemical analysis, together with a

statement outlining the circumstances of the collection of sample.

Sec. 6. All process or renovated butter intended for exportation or in the course of exportation must be marked as provided for in these regulations.

Sec. 7. All process or renovated butter consigned to a foreign country must be inspected and duly certified before delivery to any vessel, carrier, or transportation company. Officers and agents of vessels and of transportation companies transporting merchandise consigned to foreign countries shall not accept process or renovated butter for transportation and export unless accompanied by an official inspection certificate issued pursuant to these regulations, properly dated and countersigned by an inspector. No vessel having on board any process or renovated butter for exportation from any port of the United States will be cleared until the owner or shipper shall obtain an inspection certificate as required by these regulations, attesting to the purity, legal composition, and suitability for export of such process or renovated butter.

Sec. 8. Owners or shippers of process or renovated butter intended for export shall apply for inspection in writing to the Chief of Bureau. The said application shall state the location or place of business of the owner or shipper and the usual place or places where the process or renovated butter may be inspected, the place or places from which it is directly transported to the exporting vessel or transportation company, and the probable frequency of exports.

Sec. 9. The Chief of Bureau shall, upon receipt of such application, designate an inspector for the service required.

Sec. 10. The owner or shipper will notify the inspector of every export shipment to be made by him, at least 12 hours in advance, and shall briefly describe the location,

form of package, and quantity of process or renovated butter to be inspected. The inspector will not be required to make inspections at two or more places distantly removed from one another if the materials are to be included in one shipment, but the inspection of an entire shipment may be made at the pier or place of loading for export.

Sec. 11. Inspections of process or renovated butter for export may be made at the place of manufacture and such inspections may also be made at the place of exportation, if inspection has not previously been made, or, in the opinion of the inspector, a reinspection is necessary. The certificate for export will ordinarily be given by the inspector at the factory or at the place where the customs papers for export are prepared.

Sec. 12. The inspector will examine the merchandise specified with the least possible delay. And it will be the duty of inspectors to examine any process or renovated butter for export, upon the application, formal or informal, of transportation companies or their agents, or any such process or renovated butter about to be loaded for export, whether or not notice thereof has been received.

Sec. 13. Inspectors may make such examination of the process or renovated butter for export in such detail as in their judgment is deemed necessary to show that such butter complies with the law and the regulations. They may take samples of the same and detain the shipment, if deemed necessary, until chemical tests of samples are made. The presence, intact and properly affixed thereon, of the stamps, marks, and labels on a lot of process or renovated butter offered for export from a registered factory or factories may be accepted by an inspector as evidence of purity and of manufacture in accordance with law and these regulations, and the prescribed export certificate may then be executed by the inspector. Additional marks or labels may, however, be required by the inspector for the more com-

plete identification of the process or renovated butter to be exported.

Sec. 14. The inspector shall complete, countersign, and issue a certificate of export. Such certificate shall be dated, shall show the names of the exporter and consignee, and shall describe the lot of process or renovated butter to which it applies. Such description shall include the State, revenue district, and factory number of every factory represented in the lot, and the number of packages from each factory, their respective weights and the shipping marks. Such certificate shall state that the process or renovated butter in question is the product of a registered factory, of legal composition, and suitable for export. Certificates shall be numbered serially and rendered in triplicate.

Sec. 15. Only one certificate shall be issued for each consignment unless otherwise directed by the Chief of Bureau.

Sec. 16. The original certificate shall be delivered to the shipper and shall be used only for the purpose of effecting the transportation and delivery of the consignment.

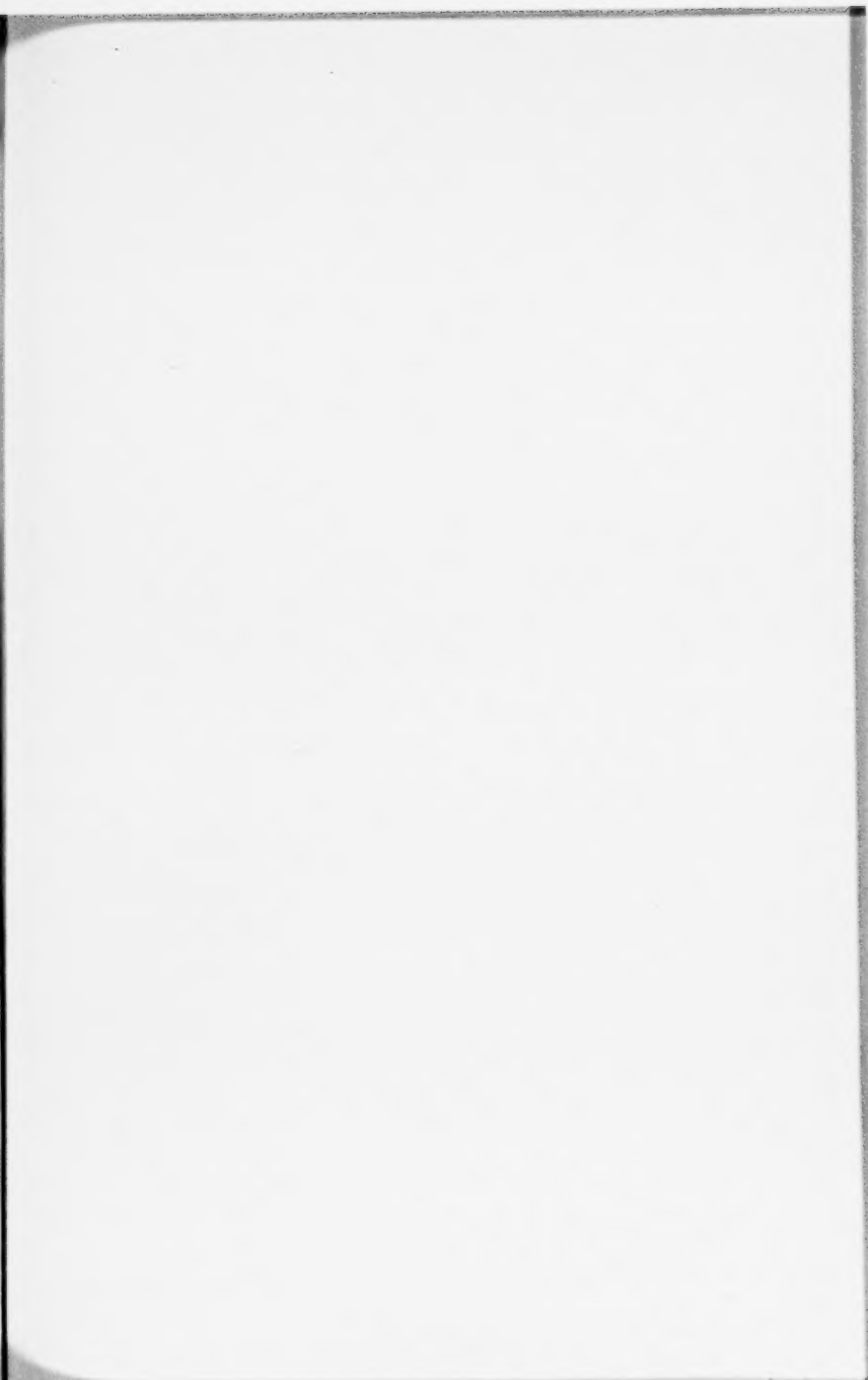
Sec. 17. The duplicate of the certificate shall be delivered to the shipper and by him to the agent of the railroad or other carrier which transports the consignment from the United States otherwise than by water, or to the chief officer of the vessel on which the export shipment is made and without which no clearance shall be given to any vessel having aboard any process or renovated butter and shall be used only by these agencies and for the purpose of effecting the transportation of the consignment certified. The chief officer of the vessel shall file such duplicate with the customs officer at the time of filing the master's manifest or the supplemental manifest.

Sec. 18. The triplicate of the certificate shall be retained by the inspector issuing the same.

Sec. 19 Under no circumstances shall the original or the triplicate of any certificate be used for the purpose for which it is prescribed by paragraph 17 hereof that the duplicate shall be used.

Sec. 20. No person operating any steam or sailing vessel, and no railroad or other carrier, shall receive for transportation to any foreign country any process or renovated butter, except ship stores and small quantities exclusively for the personal use of the consignee and not for sale or distribution, unless and until a certificate of inspection covering the same has been issued and delivered as provided in these regulations.

Sec. 21. All special requirements, if any, of foreign countries in regard to export certificates for process or renovated butter shall be complied with in respect to all certificates issued, provided such requirements are not in violation of the laws of this country or the rules and regulations promulgated under such laws.





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CHARLES ELMORE CROPLEY
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1945

NO. 295

CLOVERLEAF BUTTER COMPANY, a Corporation,
Petitioner (Claimant-Appellee Below),

VS.

UNITED STATES OF AMERICA,
Respondent (Appellant Below).

BRIEF FOR PETITIONER ON PETITION FOR
WRIT OF CERTIORARI TO THE UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE FIFTH CIRCUIT

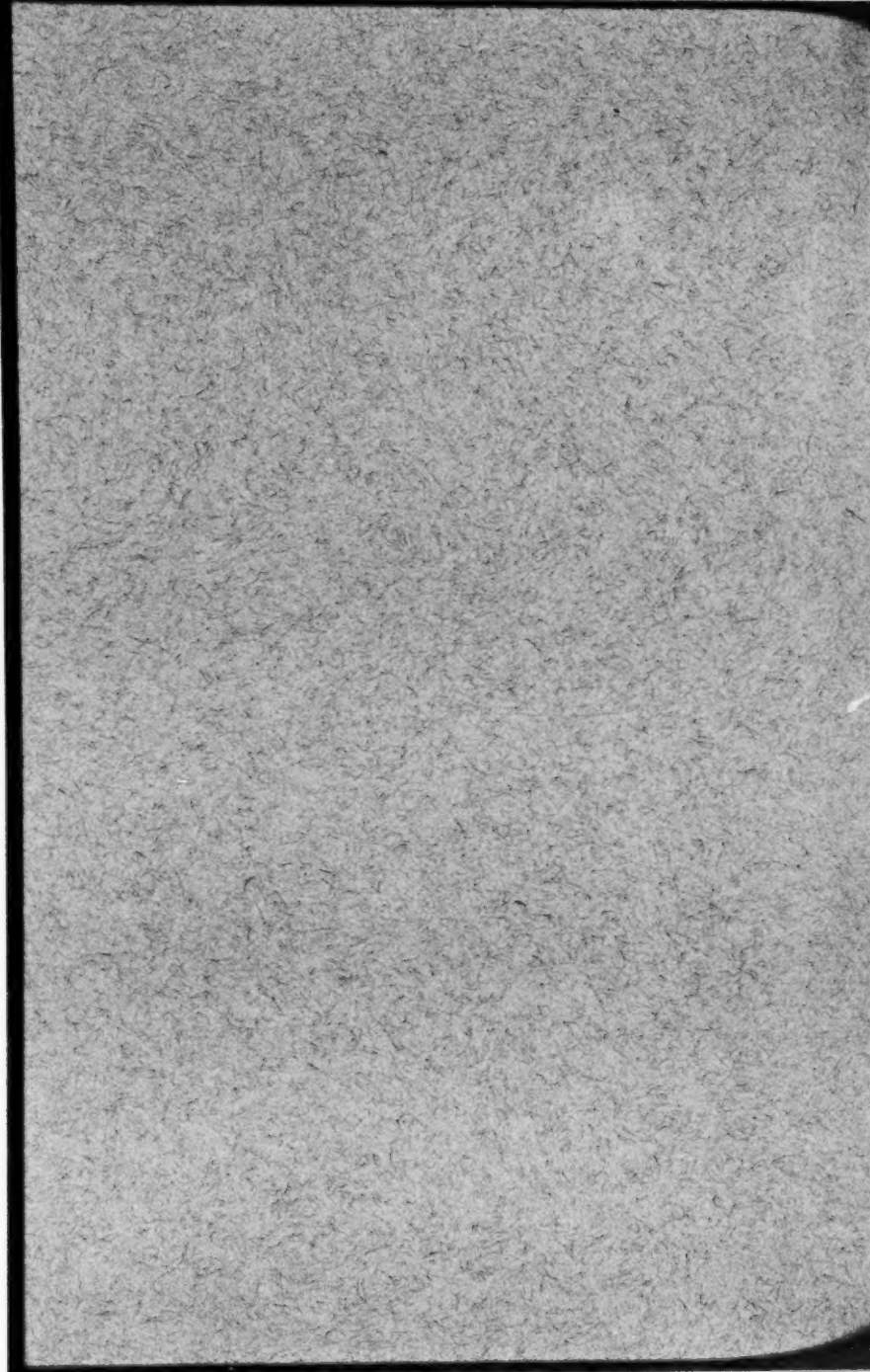
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INDEX

	<i>Page</i>
Importance of the Question Presented.....	1
Points of Law.....	4
Point A. The Circuit Court of Appeals for the Fifth Circuit decided an important question of Federal law with respect to the applicability of the Federal Food, Drug and Cosmetic Act to packing stock butter transported and held by Petitioner for the sole and exclusive purpose of manufacturing same into process or renovated butter under the provisions of the Renovated Butter Act and Regulations promulgated thereunder which has not been, but should be, settled by this Court.....	4
Point B. The Circuit Court of Appeals for the Fifth Circuit has decided a Federal question in a way probably in conflict with applicable decisions of this Court with respect to construction of statutes as declared in many cases.....	4
Propositions, Quotations and Citations of Authority under Point A.....	5, 6, 7
Argument Under Point A.....	{7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19
Propositions, Quotations and Citations of Authority under Point B.....	20, 21
Argument Under Point B.....	22, 23
Conclusion	24, 25

TABLE OF CASES CITED

	<i>Page</i>
Andersen vs. U. S. (C.C.A. 9th Circuit) 284 Fed. 542.....	10
Anderson vs. Pacific Coast SS Co., 225 U. S. 187.....	4
Cloverleaf Butter Company vs. Patterson, 315 U.S., 148.....	6, 7, 13, 17, 19
Crow Dog, Ex parte, 109 U.S. 556.....	21

TABLE OF CASES CITED (Cont'd)

	<i>Page</i>
Hippolite Egg Co. vs. U. S., 220 U.S., 45.....	10
Leavenworth L. G. & R. Co. vs. U. S., 92 U.S. 733, 23 L. ed 634.....	4, 20
Louisville Underwriters Co., In Re, 134 U.S. 488.....	4, 20
Missouri K. & T. RR Co. vs. U. S., 92 U.S. 760.....	4
Rodgers vs. U. S., 185 U.S. 83.....	4, 21
Sorrells vs. U. S., 287 U.S. 435, 53 Sup. Ct. 211.....	4, 20
Townsend vs. Little, 109 U.S. 504.....	4, 20
Ex Parte U. S. (C.C.A. 5th Circuit) 140 Fed. (2nd) 19.....	11
U. S. Ex Parte, 226 U.S. 420.....	4
U. S. vs. 1851 Cartons Frozen Whiting, (C.C.A.) 146 Fed. (2nd) 760.....	10
U. S. vs. 200 Cases Adulterated Tomato Catsup, 211 Fed. 780.....	10
U. S. vs. 200 Cases Canned Salmon, 289 Fed. 157.....	10
U. S. vs. Krumm, 269 Fed. 848.....	10
U. S. vs. 52 Drums Maple Syrup, (C.C.A.) 2nd Circuit, 110 Fed. (2nd) 914.....	10
Washington vs. Miller, 235 U.S. 422.....	4

ENCYCLOPEDIAS

	<i>Page</i>
50 American Jurisprudence, page 354, Sec. 354.....	4, 21
Ib, page 366, Sec 362.....	4
Ib, page 565, Sec. 564.....	4
Ib, page 367, Sec. 363.....	20

STATUTES CITED

	<i>Page</i>
Renovated Butter Act, May 9th, 1902,	
Chap 784.....	<div style="display: flex; align-items: center; justify-content: flex-end;"> { <div style="display: flex; flex-direction: column; align-items: flex-end; margin-left: 5px;"> 1, 2, 5, 7, 9, 11, 12, 13, 14, 15, 16, 22, 23, 24, 25 </div> </div>
Renovated Butter Act Amendment,	
Aug. 10, 1912, 37 Stat. 273.....	5
Renovated Butter Act Amendment 1939	
I. R. C., Sec 2320, et seq.....	1, 5, 7, 23
Federal Food, Drug & Cosmetic Act	
(June 25, 1938) Chap. 675, 52 Stat. 1040	
21 U. S. C. A., Sec. 301-392.....	<div style="display: flex; align-items: center; justify-content: flex-end;"> { <div style="display: flex; flex-direction: column; align-items: flex-end; margin-left: 5px;"> 1, 4, 7, 10, 12, 13, 14, 18, 23, 24 </div> </div>

DEFINITIONS

	<i>Page</i>
Butter, I. R. C. Sec. 2320, Sub-section A.....	14
Process or Renovated Butter, I. R. C.	
Sec. 2320, Sub-section C.....	14

CONGRESSIONAL RECORD

	<i>Page</i>
57th Congress.....	5
Senate Committee of Agriculture & Forestry	
Hearing February 17, 1902.....	5



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IMPORTANCE OF THE QUESTION PRESENTED

The question presented is, in short, whether or not the Federal Food, Drug and Cosmetic Act, as construed by the Courts, has nullified the Special Renovated Butter Act of May 9th, 1902; (Chapter 784, 32 Stat. at large, 196, Int. Rev. Code Section 2320 to 2326, particularly Sec. 2325).

It is a recognized fact, and admitted by the Court below, that most of the country or packing stock butter, when acquired by the processor, is not suitable for food in its then condition; otherwise there would be no occasion for renovation. The renovated butter industry uses such stock as raw material from which to extract the butter oil; this salvage process eliminates the impurities; but the application to this industry of the Food, Drug and Cosmetic Act, as

construed, would subject practically all of the packing stock or raw material to seizure and condemnation before it had been, or could be processed; and even before it had reached the processing plant or had been inspected by the officers or agents of the factory or by the Secretary of Agriculture, or even after such inspection.

If the Food, Drug and Cosmetic Act, as construed, is held applicable to the raw material in the process of renovation; then in that event, none of the packing stock butter could be processed except by the method provided in the Food, Drug and Cosmetic Act after seizure and condemnation under court order, and under the supervision of the Administrator of that Act, to the exclusion of the Secretary of Agriculture, and at the expense of the claimant or owner.

The Process Butter Industry could not possibly survive under such procedure; the effect of such construction of the statutes is to put the industry directly under the administration of the Federal Courts.

The Court below well recognizes this situation with which the industry is confronted, but says:

"But these considerations are for Congress, and if Congress had intended to take packing stock butter out of the Food and Drug Act, it could very easily have done so either by amending the statutory definition of food to exclude materials that go into the finished product or by expressly excluding from the Act ingredients of renovated butter."

The Petitioner here contends that the Special renovated Butter Act of 1902, covering the specific subject matter and providing in every detail for its administration, controls the Renovated Butter Industry; and that the Secretary of Agriculture had the power and authority and it was his duty to inspect and determine the suitability of the raw material to be used in the manufacture of Renovated But-

ter; and that the test of suitability is the condition of the finished product.

This question has not been settled by this Court. It involves the life of the Renovated Butter Industry which is and has been successfully operated under the said Act of Congress, and under Federal Licenses, and under the supervision of the Secretary of Agriculture, and the regulations prescribed by him, for nearly a half century.

This is a matter of great importance to the industry, to the thousands of small producers throughout the South-east, and to the general public at large. The opinion of the Court below would, in effect, destroy the authority theretofore committed to the Secretary of Agriculture by the Congress and insofar as the Renovated Butter Industry is concerned would virtually commit the entire control of the same to the Administrator of the Pure Food, Drug and Cosmetic Act, or his agents, without any authority or discretion whatsoever to do aught but seize and condemn all of the raw materials used in the manufacture of processed butter before such manufacture has been begun or could be completed.

POINTS OF LAW

POINT A.

The Circuit Court of Appeals for the Fifth Circuit decided an important question of Federal law with respect to the applicability of the Federal Food, Drug and Cosmetic Act to packing stock butter transported and held by Petitioner for the sole and exclusive purpose of manufacturing same into process or renovated butter under the provisions of the Renovated Butter Act and Regulations promulgated thereunder which has not been, but should be, settled by this Court.

POINT B.

The Circuit Court of Appeals for the Fifth Circuit has decided a Federal question in a way probably in conflict with applicable decisions of this Court with respect to construction of statutes as declared in many cases.

Sorrells vs. United States, 287 U. S. 435;

Anderson vs. Pacific Coast Steamship Co., 225 U. S., 187;

Leavenworth L. G. & R. Co. vs. United States, 92 U. S. 733;

Missouri K. & T. R. R. Co. vs. United States, 92 U. S. 760.

In Re: *Louisville Underwriters*, 134 U. S. 488;

Rodgers vs. United States, 185 U. S. 83;

Ex Parte, United States, 226 U. S. 420;

Washington vs. Miller, 235 U. S. 422;

Ex Parte, Crow Dog, 109 U. S. 556;

Townsend vs. Little, 109 U. S. 504;

50. Am. Jur. Pages 354, Section 354, Page 366, Sec. 362;
Page 565, Sec. 564.

POINT A.

1. The Renovated Butter Act, May 9th, 1902, 32 Stat. 194, 197, I.R.C. 2320-2327, amended August 10th, 1912, Chapter 284, 37 Stat. 273, was adopted after great deliberation and full discussion of its purpose and of the nature of the materials entering into the manufacture of process and renovated butter and was intended by Congress to be a Special Act regulating that industry.

Congressional Record, 57 Congress, Pages 1352, 1622, 1658, 3192, 3278-9, 3316, 3454, 3504, 3607, 3610, 3611, 4585-7.

Senate Committee on Agriculture and Forestry, hearing February 17th, 1902, Pages 4, 5, 6, 7, 8, 9, 49, 50, 51, 52 and 53.

2. Under the Renovated Butter Act (I.R.C. Section 2325) the Secretary of Agriculture is authorized and required to cause a rigid sanitary inspection to be made at such times as he may deem proper or necessary of all factories and storehouses where process or renovated butter is manufactured, packed or prepared for market and of the products thereof and materials going into the manufacture of the same. All process or renovated butter shall be marked with the words, "renovated butter" or "process butter". The Secretary of Agriculture shall make all needful regulations for carrying this Section and Sections 2326 (c) and 2327 (b) into effect and shall cause to be ascertained and reported from time to time the quantity and quality of process or renovated butter manufactured and the character and condition of the material from which it is made. *And he shall also have power to ascertain whether or not materials used in the manufacture of said process or renovated butter and deleterious to health or unwholesome in the finished product and in case such deleterious or unwholesome materials are found to be used in product in-*

tended for exportation or shipment into other States or in course of exportation or shipment *he shall have power to confiscate the same.*

3. The production of renovated butter is taxed and regulated by the Renovated Butter Act and by such regulatory provisions the entire process of manufacture is subject to the supervision of the Secretary of Agriculture.

Cloverleaf Butter Co. v. Patterson, 315 U.S. 148.

4. The manufacture and distribution in interstate and foreign commerce of process or renovated butter is a substantial industry. Its wholesome and successful functioning touches farm producers and City consumers. Science made possible the utilization of large quantities of packing stock butter which fell below the standards of public demand and Congress undertook to regulate the production *in order that the resulting commodity might be free of ingredients deleterious to health.*

Cloverleaf Butter Co. v. Patterson, *Supra*.

5. Inspection of the factory and of the material was provided for explicitly. Confiscation of the finished product was authorized upon a finding of its unsuitability for food throughout the use of unhealthful or unwholesome materials. A finding that might be based upon visual or delicate laboratory test or upon observation of the use of such material in the process of manufacture.

Cloverleaf Butter Co. v. Patterson, *Supra*.

6. By the Statutes and Regulations the *Department of Agriculture* has authority to watch the consumers' interest throughout the process of manufacture and distribution. It sees to the sanitation of the factories in such minutiae

as the clean hands of the employees and the elimination of objectionable odors, inspects the materials used, including air for aerating the oils and confiscates the finished product when materials which would be unwholesome, if utilized, are present after manufacture.

Cloverleaf Butter Co. v. Patterson, Supra.

7. Congress hardly intended the intrusion of another authority during the very preparation of a commodity subject to the surveillance and comprehensive specifications of the *Department of Agriculture*.

Cloverleaf Butter Co. v. Patterson, Supra.

8. Whether the sanction used to enforce the Regulation is condemnation of the material or the product is not significant.

Cloverleaf Butter Co. v. Patterson, Supra.

ARGUMENT

The Renovated Butter Act was enacted by Congress in 1902, amended in 1912, and readopted as a part of the Internal Revenue Code in 1939.

It is a special enactment relating to this particular industry; and fully covers and regulates the subject matter.

It was adopted to remedy the condition existing at the time, fully recognized by Congress as shown by testimony and discussions before the Committees and debates on the floors of both houses.

The attention of Congress was directed particularly to the need of sanitary inspection and regulations of the industry and the materials entering into the manufactured product, as well as the methods employed.

Prior to the passage of the Act renovated butter plants were numerous—each a law unto itself as to sanitation.

Naturally there were many abuses. The renovated butter industry supplies a market for country butter which would otherwise be lost and offers a wholesome product to the consumer cheaper than creamery butter and sold for what it is, properly labelled.

In order to ascertain the intent of Congress:

“Among the matters which have been regarded as properly considered, are the nature of the several Acts involved, the history of such Acts, the State of law when they were passed, the history of the times, or the facts and circumstances surrounding their enactment, as well as the language and respective titles thereof, the consequence of one construction or the other and the objects and purposes sought to be attained.”

50 Am. Jur. 542, Section 537 and Notes.

The first Federal Food and Drug Act was adopted June 30th, 1906 (Chapter 3915, 34 Stat. 768).

The present Federal Food and Drug Act was adopted June 25th, 1938 (Chapter 675, 52 Stat. 1040).

The Renovated Butter Act was considered by this Court in the case of *Cloverleaf Butter Company vs. Patterson*, 315 U. S. 148, 62 S. Ct. 491, which was a case brought by this Petitioner to enjoin seizures of raw materials—packing stock butter—by Patterson as Commissioner of Agriculture and industries of the State of Alabama under the State Pure Food and Drug Act and involved the question as to whether or not by the adoption of the Renovated Butter Act Congress had preempted and fully occupied the field with respect to the manufacture of process or renovated butter. No other question was presented by the pleadings.

The majority opinion held that the Renovated Butter Act precluded the State authorities from seizure of raw material intended for use in the manufacture or process or renovated butter in interstate commerce.

In the foregoing points we have referred to certain excerpts from the majority opinion in the Patterson case, which in our judgment are controlling here; and the decision of the Court of Appeals for the Fifth Circuit is in conflict with the same or has misconstrued or misapplied the same.

We agree with the opinion of the Court of Appeals where it holds that it was not the intention of Congress to leave packing stock butter manufacturers completely free to use in making their completed products any kind of filthy and putrid materials they choose to use in the faith, the substance of things hoped for, the evidence of things not seen, that, in homely phrase, it will all come out in the wash.

We further agree that there should be inspection of the material and the finished product.

However, we submit that the Court of Appeals is in error in holding that standards and procedure of the Federal Food, Drug and Cosmetic Act must be applied to the renovated butter industry, during the process of manufacture.

It is our contention that the inspection of the raw material as well as all the processes of manufacture of process or renovated butter is regulated by the Renovated Butter Act and is placed under the supervision of the Secretary of Agriculture.

The point is very material for the reason that under the Federal Food, Drug and Cosmetic Act, as construed, the standard is whether the material is fit for use in its present condition.

The standard under the Renovated Butter Act is whether the raw butter is in such condition as that it can be made into a wholesome product which is not deleterious to health.

In other words, it is a question of approach of the two Statutes.

United States Circuit Court of Appeals for the Second Circuit, in the case of *United States vs. 52 Drums of Maple Syrup*, 110 Fed. (2d) 914, which involved syrup transported as a raw material not to be sold or otherwise used until it had been processed, held that evidence offered by the claimant that all excesses of poisonous matter which had gotten into the raw syrup would have been removed by the claimant before the same was sold or otherwise disposed of and its intention so to do presented a wholly false issue; that:

"The intended use to which adulterated food is to be put after it has been shipped in interstate commerce is immaterial on the question of the Government's right to forfeit because of such shipment."

Citing:

Hippolite Egg Company vs. United States, 220 U. S. 45.

The Federal Food, Drug and Cosmetic Act has also been construed by many Courts, and insofar as we are advised by all Courts considering the subject as prohibiting the interstate shipment of food which consists in whole or in part of any filthy, putrid or decomposed substance, irrespective of whether it was injurious to health.

See:

United States vs. 1851 Cartons Frozen Whiting, CCA Tenth Circuit, 146 Fed. (2d) 760.

Andersen vs. United States CCA Ninth Circuit, 284 Fed. 542.

United States vs. 200 Cases Adulterated Tomato Ketchup, 211 Fed. 780.

United States vs. Krumm, 269 Fed. 848.

United States vs. 200 Cases, more or less, Canned Salmon, 289 Fed. 157.

The District Judge evidently had in mind the desirability of determining whether or not the packing stock butter in question here was such as might be processed into food suitable for human consumption when he entered the order of October 4th, 1943, Record Page 40, which provided that the material be processed at the expense of the claimant, the taking of samples before and after such processing, and the retention of jurisdiction, custody and possession of the subject matter to the same extent as if the order had not been made. However, the Government was not satisfied with this order and applied to the Circuit Court of Appeals for the Fifth Circuit for a mandamus to vacate the same.

The majority opinion (Waller, Circuit Judge, dissenting) held that as the libels were filed under the Federal Food, Drug and Cosmetic Act, there was no authority in law for processing or removal of impurities until after an order of condemnation had been rendered, the cost paid, bond executed, as provided by Section 334 (d) of the Act. See *In Re: United States*, 140 Fed. (2d) 19.

The Circuit Court of Appeals states in its opinion in the present case:

"What was intended by the Renovated Butter Act, and all that was intended, was that renovated butter could be made out of stock, which, while not in its then state fit for human consumption, was yet not so unfit as to require its condemnation."

Conceding for the sake of argument only that this is a correct interpretation of the Act, under the standards of the Federal Food, Drug and Cosmetic Act, as construed by the Courts, there is no middle ground and that Act, if applicable, would condemn the raw material as above described by the court; and even if it were contaminated by the slightest foreign substance; and even if it was conceded

as in the Maple Syrup Case that all impurities could be removed.

Under the Renovated Butter Act, Section 2325, the duty of inspecting the raw material entering into process or renovated butter is upon the Secretary of Agriculture and it is his province to determine whether or not such material will be deleterious to health or unwholesome in the finished product. In case such deleterious or unwholesome materials are found to be used in the product intended for interstate shipment he has power to confiscate the same.

In addition to the right and the duty of the Secretary of Agriculture to confiscate the finished product, if unwholesome or deleterious to health; we concede and nobody questions the right of the Administrator under the Food, Drug and Cosmetic Act, to seize any process or renovated butter offered for sale in interstate commerce if not measuring up to the standards of that law or which is not fit for food.

The Court can readily see the situation of a manufacturer of process butter—a salvage process. His source of supply is beyond his control. It comes from the small farmers in the Southeastern States. It is well known that dairy products are peculiarly subject to contamination. The Renovated Butter Act was adopted to protect the public in the *finished product*—the only thing offered for sale. The Secretary of Agriculture has adopted the most exacting regulations, which are set out in the Appendix to the Petition for Certiorari.

If every lot of packing stock butter sought to be renovated which is not fit for food in its then condition must be seized and condemned; the Court costs paid, bond given and the processing operation conducted under the surveillance and at the convenience of a representative of the Administrator whose expense must be paid by the manufacturer, as required by the Food, Drug and Cosmetic Act,

USCA, Title 21, Section 334 (d), before the material can be used, as the two opinions of the Circuit Court of Appeals in effect, hold; the practical result will be that the process butter industry is outlawed.

The opinion of the court below seems to have been largely influenced by a statement in the majority opinion in the case of *Cloverleaf vs. Patterson, supra*, where the Court says:

"Further, we agree with respondent's contention that there is no authority to confiscate or destroy material under the Renovated Butter Act. It should be noted that packing stock butter, adulterated under the definitions of Section 402 of the Federal Food, Drug and Cosmetic Act, 52 Statute, 1046, when introduced into or while in interstate commerce, may be confiscated under Section 304 while in interstate commerce or at any time thereafter.

Cf: *United States vs. 9 Barrels of Butter*, 241 Fed. 99, Page 1631."

It is significant that the Court suggested that the facts in the 9 Barrels of Butter case be compared with those of the case then at bar.

As we understand it, the Court did not regard packing stock butter held by the manufacturer for processing in the regular course of business to constitute "Food" under the definitions of the Pure Food and Drug Act; but if so, the Special Renovated Butter Act made it an exception to that law, when applicable.

Whatever the above quotation from the majority opinion in the Patterson case *supra* intended, that case was not within the *focus* of the case being then considered by and which was immediately before the Supreme Court; and the expression should not be regarded as settling that matter, which is the prime question raised in the present case by this Petition.

Section 401 of the Food, Drug and Cosmetic Act of June

11, 1938, as codified in U. S. C. A. Title 21, Sec. 341, provides that:

"No definition and standard of identity and standard of quality shall be established for * * * butter
* * *

Butter is specifically defined in the Renovated Butter Act, I.R.C. Sec. 2320, Subsection A, which is as follows:

"Butter—For the purpose of this chapter and Sec. 3206 and 3207, the word "butter" shall be understood to mean the food product usually known as butter which is made exclusively with milk and cream and with or without common salt and with no coloring."

The same Act, in Subsection C, defines Process or Renovated Butter as follows:

"Process Butter or Renovated Butter is defined to mean butter which is subjected to any process by which it is melted, clarified and refined, and made to resemble butter; always excepting "adulterative butter" as defined by subsection (b)."

The 9 Barrels of Butter case referred to in the majority opinion in the Patterson case, *supra*, is completely distinguished by the facts on which the opinion in the 9 Barrels case is based. If adulterated butter is shipped interstate, *unless intended for renovation*, it could be libeled under the Federal Food and Drug Act. In support of that statement the court cited the case of U. S. vs. 9 Barrels Butter, 241 Fed. 499.

A careful distinction must be drawn as to the *facts* in that case and in a case where the butter was shipped in interstate commerce solely for renovation. In the Nine Barrel case the butter involved was shipped in interstate commerce for *LADLING*. Therefore, it was subject to the

full and complete control and action of the Federal Pure Food Law. Federal Judge Hand stated that he had authority to condemn the butter, or in his discretion he could order it renovated. He ordered it renovated. If, on the other hand, that same butter had been shipped to a licensed manufacturer of renovated butter, the same judge and the same court would have held undoubtedly that it was a matter for the Secretary of Agriculture under the Renovated Butter Act. The distinction intended by the Court is that adulterated butter *not intended for renovation* is subject to the Federal Food, Drug and Cosmetic Act; adulterated butter intended for renovation is not subject to the Food and Drug Act, but is under the *exclusive jurisdiction of the Renovated Butter Act*.

In one circumstance it can be acted upon by the Pure Food Law of the Federal Government and is subject to libel, and condemnation; in the other circumstance it is subject to the exclusive jurisdiction of the Secretary of Agriculture under the Renovated Butter Act. Therefore, the dictum of the Supreme Court in the Patterson case, *supra*, is sound law; and not in anywise in conflict with the decision in that case. It was intended to show that in any event adulterated butter shipped in interstate commerce will either be condemned under the Pure Food Law, or it will be purified, cleansed, refined and rendered safe for use under the supervision of the Secretary of Agriculture as provided in the Renovated Butter Act.

Certainly Congress did not make it a race between the Administrator under the Food, Drug and Cosmetic Act and the Secretary of Agriculture as to which should exercise authority in a given case; that authority fell to the one or to the other branch of the Federal Government, as the case might be; both intended to protect the public against impure food. If the Food and Drug authorities have power to condemn packing stock butter shipped in interstate com-

merce solely for renovation, then the power of the Secretary of Agriculture to inspect the raw materials and watch and supervise the processing from beginning to end, would be nullified and rendered impotent. The U. S. Supreme Court has held exactly to the contrary; in the case of Cloverleaf Butter Company, *supra*, the Court said:

"Congress hardly intended the intrusion of another authority during the very preparation of a commodity subject to the continuous surveillance and comprehensive specifications of the Department of Agriculture."

The Renovated Butter Act confers upon the Secretary of Agriculture authority over the raw material as disclosed by Section 2325 by the following language:

"a rigid sanitary inspection of all factories and store-houses where renovated butter is manufactured, packed or prepared for market, and of the products thereof and materials going into the manufacture of same."

It is true that Congress did not give him authority to condemn the "*materials*" before being subjected to the manufacturing processes, but he can segregate it, and cause it to be renovated under his scrutiny, and if the finished product is found to be deleterious or unwholesome, he can confiscate it. That authority is unquestioned and there is no doubt as to what Congress meant to say or did say.

But the standard by which he was to judge the FITNESS was whether it could be MADE FIT by processing. If Congress did not intend for the Secretary of Agriculture to have this power, it would not have mentioned the raw material, but its language would have been confined to the finished product.

Should the will of Congress be frustrated by attempting to hold that some other law governs? Is that the way to

remedy a defect or weakness in the law if it were conceded that it was weakness? No. The remedy is to amend the Renovated Butter Act. Congress can and will amend the law if it deems it necessary. It is not the duty of the Courts to correct such defects if such exist. The remedy is with the law making body or Congress.

The Supreme Court of the United States in the case of *Cloverleaf Butter Company vs. Patterson*, 315 U. S. 148, said:

"Whether the sanction used to enforce the regulation is condemnation of the material or the product is not significant. Since there was Federal regulation of the materials and composition of the manufactured article, there could not be similar state regulation of the same subject."

It cannot be contended that because the Act did not give the Secretary of Agriculture power or authority to condemn the "materials" before renovation it left that field open; and the Federal Security Administrator can seize such materials, in interstate commerce and condemn same. Although Congress specifically directs the Secretary of Agriculture to inspect the materials he cannot do so because the Federal Security Administrator has taken them beforehand by libel. Thus the power of the Secretary of Agriculture to inspect them as directed is completely frustrated and denied.

Congress provides that if the Secretary of Agriculture finds that an unwholesome material is used it is his duty to seize the finished product unless it has been rendered pure and wholesome. The purity and *wholesomeness of the finished product* was the criterion by which he was to measure the fitness of the raw material. If that is the law, and that was the will of Congress, the Courts should not by judicial decree create a different standard. There is a

remedy, and that remedy is the power of Congress to amend its laws if it deems it necessary. The Renovated Butter Act gives the Secretary of Agriculture full and ample authority to enforce the "standard" set up by the Act. Congress had the right to prescribe that standard, and it is simple and clear that it intended the Secretary should have full control of the raw materials and states what his duty was in case such materials were used.

There is sound reason why Congress imposed full authority upon the Secretary of Agriculture. It gave him discretion as to whether he would sanction the use or non-use of the "materials" and if in his judgment or discretion such "materials" were *unfit* he could follow them through the manufacturing processes, take samples at different stages of the way, examine the finished product, and if he found any of the objectionable matter therein, or that it was unwholesome, he could confiscate them.

The Federal Food, Drug and Cosmetic Act gives no such authority to its agents or any discretion over the raw materials to be used. If there is the slightest adulteration found in the raw material, of any kind, it is their duty to seize the materials. They cannot say to the manufacturer that you can use this or that part. One fly in a can makes the whole can unfit for use; too much moisture, or any foreign matter even if wholly innocuous, makes it adulterated. When they take samples they do not sample the butter, but *they take samples of the foreign matter*. So one fly or one bug would be a sample of the can or condition of the butter; and as construed would subject the entire contents to seizure and condemnation.

Such a rule would close the doors of every Renovated Butter Factory in the country. Such procedure under the Food, Drug and Cosmetic Act would deprive every farmer in the country of a market for his surplus farm butter. Congress did not intend that this should be done.

As said by the Supreme Court in the case of Cloverleaf Butter Company vs. Patterson, supra:

"The manufacture and distribution in interstate and foreign commerce of process butter is a substantial industry which, because of its multi-state activity, cannot be effectively regulated by isolated competing states."

"Its wholesome and successful functioning touches farm producers and city consumers. Science made possible the utilization of large quantities of packing stock butter *which fell below the standards of public demand (Italics Ours)*, and Congress undertook to regulate the production in order that the resulting commodity might be free of ingredients deleterious to health."

Thus our highest Court after an exhaustive study and great research into the entire question says that Congress intended that if the raw material did have deleterious matter in it which could be removed by scientific methods now used, the resulting product would be fit for use and could be sold. In other words, matter contained therein would not render it unfit for use as raw material for renovating under the Renovated Butter Act.

POINT B.

The Circuit Court of Appeals for the Fifth Circuit below has decided a Federal case in probable conflict with the applicable decisions of this Court with reference to the construction of statutes as declared in many cases.

PROPOSITION I.

"All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice or oppression or an absurd consequence. It will always therefore, be presumed that the Legislature intended exception to its language which would avoid results of this character. The reason of the law in such cases should prevail over its letter.

U. S. vs. Kirby, 7 Wall, 482, 19 L. Ed. 278.

Sorrells vs. U. S., 287 U.S. 435, 447; 53 Sup. Ct. Rep. 211, 214.

Where the literal construction of an Act would cause results that would not be within the Legislative intent, it cannot be deemed to accomplish its purpose. Unreasonable, absurd, or ridiculous consequences should be avoided.

50 Am. Jur., Page 385, Sec. 377.

PROPOSITION II.

"According to the well settled rule that general and specific provisions, in apparent contradiction, whether in the same or different statutes and without regard to the priority of enactment, may subsist together, the specific qualifying and supplying exceptions to the general."

Townsend vs. Little, 109 U. S., 504; 27 L. Ed., Page 1012.

"A thing which is within the letter of the statute is not within the statute unless it be within the intention of the makers."

Leavenworth L. & G. R.R. Co. vs. U. S., 92 U.S. 733; 23 L. Ed. 634.

"In the enactment of a statute, the earlier Acts on the same subject are generally presumed to have been in the knowledge and view of the Legislature, which is regarded as having adopted the new statute in the light thereof and with reference thereto, therefore, in the construction of the statute, reference may be made to earlier statutes on the subject, which are regarded as in *par materia* with the later statute."

50 Amer. Jur., Page 354, Sec. 354.

"It is a canon of statutory construction that a later statute, general in its terms and not expressly repealing a prior special statute, will ordinarily not affect the special provisions of such earlier statute. In other words, where there are two statutes, the earlier special and the later general,—the terms of the general broad enough to include the matter provided for in the special,—the fact that the one is special and the other is general creates a presumption that the special is to be considered as remaining an exception to the general, and the general will not be understood as repealing the special, unless a repeal is expressly named, or unless the provisions of the general are manifestly inconsistent with those of the special."

Rogers vs. U. S., 185 U.S. 83, 88; 46 L. Ed. 816, 818.
(The Rogers Case, *supra*, is a brief in our behalf.)

Ex Parte Crow Dog, 109 U.S. 556.

Consistency in statutes is of prime importance, and in the absence of a showing to the contrary, all laws are presumed to be consistent with each other. Where it is possible to do so, it is the duty of the Courts in construction of the statutes to harmonize and reconcile laws and to adopt that construction of a statutory provision which harmonizes and reconciles it with other statutory provisions."

50 Amer. Jur., Page 367, Sec. 363.

ARGUMENT

As before pointed out, the Circuit Court of Appeals recognizes the fact that all packing stock butter comes into the plant more or less adulterated with extraneous and deleterious substances, or otherwise unfit in its then condition for human food; and that if all packing stock butter were to be condemned because not fit for human food, no matter how slight the adulteration, the Butter Renovating Industry could not survive.

However, the Court held that raw material—packing stock butter—held solely by the Petitioner for processing under the Renovated Butter Act and Regulations, which did not meet the standards of the Federal Food, Drug and Cosmetic Act, was subject to condemnation and in effect held that the wholesomeness of the finished product was not the test.

We might agree with the statement in its opinion:

“Implied repeal or limitation of one Act by another is never favored. It is not for the Courts, unless the conflict between the two Acts is inescapable and compelling, to exclude from the coverage of an Act matters which it terms expressly include, on the theory that another Act, whose general purpose seems inconsistent has impliedly repealed or limited the Act under review.”

But we respectfully submit that the Circuit Court of Appeals not only failed to take into consideration the fact that the Renovated Butter Act as adopted in 1902, amended in 1912, and re-enacted in 1939, is a special act governing the Renovated Butter Industry and that the Court below misapplied the canons of construction.

We submit that whether or not the re-enactment of the Renovated Butter Act in 1939, one year after the adoption of the Federal Food, Drug and Cosmetic Act, is important and controlling; it certainly would show, according to the canons and rules of statutory construction, that the special Renovated Butter Act was recognized by Congress as in effect and intended to cover the field of that industry, and constituted a special exception to the general provisions of the Federal Food, Drug and Cosmetic Act.

CONCLUSION

The Congress was fully aware of the necessity for the special law known as the Renovated Butter Act, adopted in 1902; after the most thorough and complete investigation and the hearing of testimony was had before the Committee, and full discussion on the Floor, in regard to the bill, its provisions; its purposes and intent. The Act was recognized by amendment, adopted in 1912; it was sought to be integrated with the Meat Inspection Laws enacted by Congress; and no conflict was ever found between the original Pure Food Law of 1906 and the Renovated Butter Act. The latter statute, with the meticulous regulations adopted and promulgated under the authority of that Act have successfully eliminated from the Renovated Butter Industry undesirable plants which could not measure up to the requirements; and for nearly half a century have controlled and regulated a successful, important and essential industry; it can hardly be said that Congress intended to repeal, limit or modify the terms of this special Act by the adoption of the General Pure Food, Drug and Cosmetic Act of 1938.

It is clear that there was no necessity for Congress to specifically except the Renovated Butter Act from the provisions of the general law. The canons of construction and all statutory provisions took care of that.

Under the conclusions of the law as set out in the opinion of the Court below, a death blow would be struck to the Renovated Butter Industry; the markets of the thousands of small farmers throughout the Southeast for their packing stock or country butter would be destroyed; the opportunity of many, many thousands of the public to buy a wholesome Renovated Butter, knowing what it is, at a price they are able to pay and less than the price of Creamery Butter, would be taken away.

The Court will take judicial knowledge of the fact that

butter is now one of the scarcest food products on the market; and, even if unrationed or if the purchaser has the available points, it can hardly be procured; there is no complaint from the consumers or from the public as to Renovated Butter and the conclusion of the Court below on this Record shows that good butter was produced by the manufacturer. The importance of the industry was recognized in the Patterson Case, *supra*.

Under the holding of the Court below, all packing stock or country butter intended for renovation must be first condemned under the Federal Food, Drug and Cosmetic Act; or it must be held by the Court that the industry is controlled by the special law known as the Renovated Butter Act; and that it is exclusively under the regulation, control and dominion of the Secretary of Agriculture until he has passed the finished product.

The proceedings in the instant case have not been instituted by or on motion of the Secretary of Agriculture.

It is hardly conceivable that the Congress intended to authorize the intrusion into the power and authority which Congress had delegated to the Secretary of Agriculture by another independent and separate Federal Bureau, operating under a different statute and with different standards and having a different purpose.

It is most earnestly insisted that the Writ of Certiorari should be granted, to the end that the opinion of the Circuit Court of Appeals of the Fifth Circuit below be reviewed.

All of which is respectfully submitted.

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INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Statutes involved	2
Statement	3
Argument	5
Conclusion	12

CITATIONS

Cases:

<i>Cloverleaf Butter Co. v. Patterson</i> , 315 U. S. 148.	4, 5, 6, 7, 8, 9, 10, 11
<i>In re United States</i> , 140 F. 2d 19.	4, 5
<i>Union Dairy Co. v. United States</i> , 250 Fed. 231.	11
<i>United States v. Dotterweich</i> , 320 U. S. 277.	10
<i>United States v. 52 Drums Maple Syrup, etc.</i> , 110 F. 2d 914.	11
<i>United States v. 426 Bags of Economy Special Hog Feed</i> , 276 Fed. 34.	11
<i>United States v. Nine Barrels of Butter</i> , 241 Fed. 499.	6, 8
<i>United States v. Thirteen Crates of Frozen Eggs</i> , 215 Fed. 584, affirming 208 Fed. 950.	11

Statutes:

Federal Food, Drug, and Cosmetic Act of June 25, 1938, c. 675, 52 Stat. 1040, 21 U. S. C. 301 et seq.:	
Section 201 (f)	2, 5
Section 304 (a)	2, 3, 5
Section 402 (a) (3)	2, 3, 6
Section 902	8
Food and Drugs Act of 1906, 34 Stat. 769, 21 U. S. C. (1934 ed.) 1 et seq.	6
Renovated Butter Act of May 9, 1902, c. 784, 32 Stat. 194, Internal Revenue Code, §§ 2320-2327	3, 7



In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 295

**CLOVERLEAF BUTTER COMPANY, A CORPORATION,
PETITIONER**

v.

UNITED STATES OF AMERICA

**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH
CIRCUIT**

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 81-86) is reported at 148 F. 2d 365. The district court did not render an opinion.

JURISDICTION

The judgment of the circuit court of appeals was entered March 27, 1945 (R. 86), and a petition for rehearing (R. 87-94) was denied May 5, 1945 (R. 95). The petition for a writ of certiorari was filed August 3, 1945. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the fact that the production of renovated butter is taxed and regulated under the Renovated Butter Act renders the seizure provisions of the federal Food, Drug, and Cosmetic Act inapplicable to packing stock butter and ladled butter apparently intended for use in the preparation of renovated butter.

STATUTES INVOLVED

The federal Food, Drug, and Cosmetic Act of June 25, 1938, c. 676, 52 Stat. 1040, 21 U. S. C. 301 et seq., provides in part:

SEC. 201. For the purposes of this Act—

* * * *

(f) The term "food" means (1) articles used for food or drink for man or other animals, (2) chewing gum, and (3) articles used for components of any such article.

* * * *

SEC. 304. (a) Any article of food, drug, device, or cosmetic that is adulterated or misbranded when introduced into or while in interstate commerce, * * * shall be liable to be proceeded against while in interstate commerce, or at any time thereafter, on libel of information and condemned in any district court of the United States within the jurisdiction of which the article is found: * * *.

* * * *

SEC. 402. A food shall be deemed to be adulterated—

(a) * * * (3) if it consists in whole or in part of any filthy, putrid, or decomposed substance, or if it is otherwise unfit for food; * * *.

The Renovated Butter Act of May 9, 1902, c. 784, 32 Stat. 194, Internal Revenue Code, §§ 2320-2327 (26 U. S. C. 2320-2327), and the regulations promulgated by the Secretary of Agriculture for carrying into effect the Renovated Butter Act, are printed in the Appendix to the petition for a writ of certiorari, pp. 16-40.

STATEMENT

Proceeding under Section 304 (a) of the Federal Food, Drug, and Cosmetic Act, 21 U. S. C. 334 (a), the United States, on July 1, 1940, and July 6, 1940, respectively, filed a libel of information and an amendment to the libel in the District Court of the United States for the Northern District of Alabama against 24 cans of ladled butter, of which the Cloverleaf Butter Company, hereinafter referred to as petitioner, is the claimant. The United States proceeded on the ground that the product seized was adulterated within the meaning of Section 402 (a) (3) of the Act, 21 U. S. C. 342 (a) (3), in that it consisted in whole or in part of a filthy animal substance. (R. 1-3.) Four other libels of information thereafter were filed against quantities of ladled butter and packing stock butter, of which petitioner is the claimant, on the ground that they were likewise

adulterated under Section 402 (a) (3) of the Act in that they consisted in whole or in part of filthy or decomposed animal substances, i. e., maggots, rodent hairs, miscellaneous insect eggs and fragments, etc. (R. 4-13). These latter causes were consolidated for trial with the libel filed against the 24 cans (R. 29-30).

Petitioner is a corporation with its place of business in Birmingham, Alabama, operating under federal license a renovated butter factory. It purchases from farmers and country merchants packing stock butter, constituting the material from which it manufactures process or renovated butter. (R. 63-64, Pet. 2; see also *Cloverleaf Butter Co. v. Patterson*, 315 U. S. 148, 150.) After the libels specified above had been filed, petitioner obtained an order from the district court, on February 17, 1942, directing that the products seized be delivered to petitioner for renovation (R. 31-34). The United States then petitioned the circuit court of appeals for a writ of mandamus to compel the district court to vacate the order as being without authority of law and to set a date for the trial of the causes. On December 16, 1943, in *In re United States*, 140 F. 2d 19, the circuit court of appeals directed the district court to proceed under the libels to determine whether the seized products are food and are adulterated within the meaning of the Act and to enter its decree accordingly (see R. 82).

Following the decision of the circuit court of appeals in *In re United States*, *supra*, petitioner moved in the district court to dismiss the suits. Apparently in reliance upon a theory drawn from the *Cloverleaf Butter* decision, *supra*, petitioner contended that the handling and use of packing stock butter are governed exclusively by the federal Renovated Butter Act and the regulations promulgated by the Secretary of Agriculture thereunder, so that the materials which it intended to use in its factory were not subject to seizure under the federal Food, Drug, and Cosmetic Act (R. 63-65). The district court held that the motion was well taken, directed that the products seized be restored to petitioner, and dismissed the libels (R. 66-67).

Upon appeal by the United States to the circuit court of appeals, the judgments of the district court were reversed and the causes were remanded with directions to proceed with the libels in accordance with the prior opinion of the circuit court of appeals in *In re United States* and with its opinion on the appeal (R. 86).

ARGUMENT

The provisions of the federal Food, Drug, and Cosmetic Act are clearly applicable in their terms to the products proceeded against in these actions. The Act (Section 201 (f), 21 U. S. C. 321 (f)) defines food as "(1) articles used for food or drink for man or other animals, * * * and

(3) articles used for components of any such article." Section 304 (21 U. S. C. 334) declares that any article of food that is adulterated when introduced into or while in interstate commerce shall be liable to be proceeded against on libel of information and condemned, and Section 402 (a) (3) (21 U. S. C. 342 (a) (3)) declares that a food shall be deemed to be adulterated "if it consists in whole or in part of any filthy, putrid, or decomposed substance, or if it is otherwise unfit for food."

The definition of food contained in the Act is broader than that appearing in the predecessor Food and Drugs Act of 1906 (34 Stat. 769, 21 U. S. C. (1934 ed.) 1 *et seq.*), which defined food as including "all articles used for food, drink, confectionery, or condiment by man or other animals, whether simple, mixed, or compound." Even under the earlier statute, however, the Food and Drug Administration had seized packing stock butter consigned to process butter plants, and this had been upheld. See *United States v. Nine Barrels of Butter*, 241 Fed. 499 (S. D. N. Y.), cited with approval in *Cloverleaf Butter Co. v. Patterson*, 315 U. S. 148, 163; see also fn. 5 of the dissenting opinion in the *Cloverleaf* case, 315 U. S. at 176.

Petitioner contends that the process of manufacturing renovated butter from packing stock butter is subject exclusively to regulation under

the Renovated Butter Act and that if packing stock butter is subject to seizure under the Food, Drug, and Cosmetic Act, the purposes of the former statute and the functions of the Secretary of Agriculture thereunder will be frustrated (Pet. 6-7, 13-14).¹ Although the *Cloverleaf* case, *supra*, was concerned with the power of a state under its pure food laws to condemn packing stock butter in view of the provisions of the Renovated Butter Act, and the issue raised in the instant case was not directly involved, we submit that petitioner's contention is foreclosed by the opinion in that case, where this Court stated (315 U. S. at 163): "It should be noted that packing stock adulterated under the definitions of § 402 of the Federal Food, Drug, and Cosmetic Act, 52 Stat. 1046, when introduced into or while in interstate commerce may be confiscated under § 304 while in interstate commerce or at any time

¹ The Renovated Butter Act (see Pet. 16-23) levies a poundage tax upon such butter and a tax on manufacturers, extends to renovated butter factories the sanitary provisions applicable to slaughtering, meat canning, and similar establishments, and provides that the Secretary of Agriculture shall inspect the places of manufacture and storage of process or renovated butter as well as renovated or process butter itself, and that "he shall also have power to ascertain whether or not materials used in the manufacture of said process or renovated butter are deleterious to health or unwholesome in the finished product, and in case such deleterious or unwholesome materials are found to be used in product intended for exportation or shipment into other States * * * he shall have power to confiscate the same" (26 U. S. C. 2325).

thereafter. Cf. *United States v. Nine Barrels of Butter*, 241 F. 499."

Petitioner argues, however, that the Food, Drug, and Cosmetic Act cannot, consistently with the regulatory provisions of the Renovated Butter Act, be applied to packing stock butter procured for purposes of renovation and that Congress therefore could not have intended that such butter should be subject to the provisions of the former statute. We think this argument cannot prevail. It should be noted at the outset that if Congress had intended to except packing stock butter from the all-embracing provisions of the Food, Drug, and Cosmetic Act it would seem that such a limitation would have been clearly expressed, particularly since the Food and Drug Administration had, under the predecessor Food and Drugs Act of 1906, repeatedly seized packing stock butter consigned to renovated butter plants. See fns. 4 and 5 of the dissenting opinion in the *Cloverleaf* case, 315 U. S. at 174 and 176, and *United States v. Nine Barrels of Butter*, *supra*. Instead, Section 902 of the Act (21 U. S. C. 392) declares that its provisions shall not interfere with the operation of certain designated statutes, but does not mention the Renovated Butter Act.

Contrary to petitioner's contention, there is no such inconsistency between the two statutes as requires an exception of packing stock butter from the provisions of the Food, Drug, and Cosmetic

Act. Both are concerned with protecting the consuming public. Nor is there any conflict in the administration of the statutes. As both the majority and dissenting opinions in the *Cloverleaf* case point out, the Secretary of Agriculture has no authority under the Renovated Butter Act to confiscate packing stock butter intended for renovation, but only the renovated butter itself if found to be deleterious. 315 U. S. at 163, 166, 171. The authorization to the Secretary to inspect packing stock butter and seize finished renovated butter does not imply that Congress intended to hamper federal control under the Food, Drug, and Cosmetic Act over the contaminated material before its manufacture into the finished product. It is thus clear that the seizure under the latter statute of adulterated packing stock butter does not infringe upon the powers and duties of the Secretary under the Renovated Butter Act.²

² A memorandum of the Chief of the Bureau of Dairy Industry to the Solicitor of the Department of Agriculture, dated October 4, 1940, which is quoted in part in fn. 4. of the Chief Justice's dissent in the *Cloverleaf* case, 315 U. S. at 174, pointed out that the development and perfection of new methods for analyzing butter has resulted in increased regulatory activity and action, particularly by state agencies and the federal Food and Drug Administration, against packing stock butter intended for use in the manufacture of renovated butter, and stated: "The Bureau of Dairy Industry, which is the administrative agency designated by the Secretary of Agriculture to enforce the process or renovated butter act, is entirely sympathetic with the activities of these agencies * * *."

Petitioner's position, on the other hand, would tend to defeat the design of the Food, Drug, and Cosmetic Act, which this Court has recently said must be construed liberally and with due regard for its beneficent purposes to keep impure and adulterated food and drugs out of the channels of interstate commerce. *United States v. Dotterweich*, 320 U. S. 277, 280. For if seizure of contaminated packing stock butter cannot be effected because of the professed intention of the processor to renovate it before it reaches the ultimate consumer, the Government is left powerless (unless it should be found pursuant to the Renovated Butter Act that the material is unwholesome or deleterious to health in the finished product) to condemn an article of food which is notoriously filthy and adulterated.³ The specific function of the seizure provisions of the federal Food, Drug, and

³ In his dissenting opinion in the *Cloverleaf* case the Chief Justice quoted the following from a letter written in July 1941 by the Assistant Chief of the Bureau of Dairy Industry to the Solicitor of the Department of Agriculture (315 U. S. at 173, fn. 3):

"It is axiomatic that despite the processes through which butter or butter oil pass during the course of manufacturing renovated butter, certain soluble materials unfit for human consumption cannot be removed and it is difficult if not impossible to detect them in the finished product. For example, a lot of butter may be infested with maggots and should be condemned for use in the manufacture of renovated butter. If not, in the melting process fat from these maggots will be mixed with the butter fat and the animal fat may be detected in the finished product only by chemical laboratory tests, if at all."

Cosmetic Act is to arrest the flow of such illicit articles before they reach the consuming public. It is obvious, of course, that there is no assurance that, if not condemned, a proscribed article of food or component thereof actually will not reach the public in the adulterated state in which it passes through interstate commerce. But if such speculation were to be permitted, the seizure provisions of the Act would be frustrated. And so the courts have held repeatedly that the conceded intention of a claimant to eliminate the objectionable element of an adulterated food before it reaches the public cannot divest a court of its power and obligation to condemn the food. *United States v. 52 Drums Maple Syrup, etc.*, 110 F. 2d 914 (C. C. A. 2); *Union Dairy Co. v. United States*, 250 Fed. 231 (C. C. A. 7); *United States v. Thirteen Crates of Frozen Eggs*, 215 Fed. 584 (C. C. A. 2), affirming 208 Fed. 950 (S. D. N. Y.); *United States v. 426 Bags of Economy Special Hog Feed*, 276 Fed. 34 (W. D. Mich.).

Finally, petitioner's professed fear (see Pet. 10) that the renovated butter industry "cannot survive" if adulterated packing stock butter is to be subjected to seizure under the Food, Drug, and Cosmetic Act, is negated by established facts. As we have shown, the Food and Drug Administration has long proceeded against adulterated packing stock butter (see p. 6 and fn. 2, p. 9, *supra*). In his dissenting opinion in the *Cloverleaf* case the Chief Justice adverted to a report

of the Administration showing that between July 1, 1933, and January 1, 1942, thirty-six seizures were made of lots of such butter which had been consigned to renovated butter plants (315 U. S. at 176, fn. 5). Yet during the decade 1931-1941, production of renovated butter increased from 1,499,041 to 2,706,852 pounds (see table set out in fn. 21 of the majority opinion in the *Cloverleaf* case, 315 U. S. at 167).

CONCLUSION

The decision of the circuit court of appeals is correct, and no conflict of decisions is involved. We respectfully submit, therefore, that the petition for a writ of certiorari should be denied.

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Acting Solicitor General.
 THERON L. CAUDLE,
Assistant Attorney General.
 ROBERT S. ERDAHL,
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SEPTEMBER 1945.





No. 295

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FILED

OCT 1 1945

CHARLES ELMORE CROOK
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1945

CLOVERLEAF BUTTER COMPANY, a Corporation,
Petitioner (Claimant-Appellee Below),

vs.

UNITED STATES OF AMERICA,
Respondent (Appellant Below).

PETITION FOR CERTIORARI TO UNITED
STATES CIRCUIT COURT OF APPEALS,
FOR THE FIFTH CIRCUIT

REPLY BRIEF OF

ERLE PETTUS
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Counsel for Petitioner.



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UNITED STATES OF AMERICA,
Respondent (Appellant Below).

PETITION FOR CERTIORARI TO UNITED
STATES CIRCUIT COURT OF APPEALS,
FOR THE FIFTH CIRCUIT

The brief in opposition filed in this cause by the acting Solicitor General for the United States serves to emphasize the importance of this case, the conflict, the differences of opinion, and the varied actual and possible constructions of the two statutes, the Renovated Butter Act and the Federal Food, Drug & Cosmetics Act in such manner as to show the vital necessity of having the matters at issue resolved by the final arbiter—The Supreme Court of the United States.

In *Cloverleaf Butter Company versus Patterson*, (315 U.S. 148), this Court recognized the fact that the renovated butter business is a substantial industry; and this is corroborated by statistics as to production very much increased during recent years.

The renovated butter industry, which has been operated for so many years under special Federal Statute, and under strict control of the Bureau of Dairying of the United States, is entitled to know whether or not it shall be permitted to continue to operate; or whether the business is

to be outlawed by construction placed upon the Federal Food, Drug & Cosmetics Act by the court below.

Realities must be faced by every business; and none can be operated successfully on pure theory. The practical operation of this business requires that the industry secure its raw material by purchase of sub-standard country butter wheresoever the same may be found within the range of its plant. During all the years of its operation, this business has relied upon the authority of the United States Secretary of Agriculture, his supervision, tests, regulations and inspection to finally determine whether or not the finished product when manufactured is suitable for shipment and sale in interstate commerce.

This Court in the Patterson case *supra* declared:

"By the statutes and regulations the Department of Agriculture has authority to watch the consumer's interest throughout the process of manufacture and distribution." (315 U. S. p. 168 of opinion.)

This Court said further in the same opinion:

"Whether the sanction used to enforce the regulation is condemnation of the material or the product is not significant." (Page 169 of opinion, 315 U.S. 169.)

As previously contended, the Congress has by the Renovated Butter Act made the final test as to suitability the condition of the finished product. Construction of the Federal Food, Drug & Cosmetics Act, as contended for by the Government, would absolutely prohibit the introduction into interstate commerce of any packing stock butter, or raw material, affected by the slightest contamination, and not fit for human food in its then condition; and able to pass every test of the Federal Food, Drug & Cosmetics Act. If all packing stock were in such condition there would be no occasion for renovation.

The Federal Food, Drug & Cosmetics Act not only prohibits the introduction into interstate commerce of raw material or packing stock not then fit for human food, and in such shape as to pass the test and standard of Federal Food, Drug & Cosmetics Act, but provides for such seizures as here attempted to be enforced; and prohibits the use of such material unless and until it has been passed upon by a court; bond given; and provision made for its processing under the eye of the administrator by order of the Court, and at the expense of the owner.

The processor is not only subjected to such impossible limitations and restrictions, but he would also be liable to criminal prosecution. Thus not only would the processor be subjected to such criminal prosecution, but every small farmer who attempted to ship his country or packing stock butter or raw material for renovation in interstate commerce, or introduce it into interstate commerce, would be liable to criminal prosecution as noted in our petition, page 12 in the following language:

"The introduction or delivery for introduction into interstate commerce of any food, that is adulterated or misbranded is prohibited. (U.S.C.A. Title 21, Sec. 331). Any person violating any of the provisions of Section 331 shall be guilty of a misdemeanor and shall on conviction thereof be subject to imprisonment for not more than one year, or a fine of not more than \$1,000 or both such imprisonment and fine; and for conviction of subsequent violation may be imprisoned for not more than three years. (U.S.C.A. Title 21, Sec. 333 — U.S.v. Dotterweich, 230 U.S. 277; 64 S. Ct. 134.)"

Title 21, Section 331 U.S.C.A., among other things defines Prohibited Acts under the Federal Food, Drug & Cosmetics Act as follows:

"331 Prohibited Acts.

"(c) The receipt in interstate commerce of any

food, drug, device, or cosmetic that is adulterated or misbranded, and the delivery or proffered delivery thereof for pay or otherwise.

“(d) The introduction or delivery for introduction into interstate commerce of any article in violation of section 344 or 355.”

The penalties for such violation are set out and defined in U.S.C.A. Title 21, Sec. 333, as follows:

“333 Penalties.

“Violation of Section 331

“(a) Any person who violates any of the provisions of section 331 shall be guilty of a misdemeanor and shall on conviction thereof be subject to imprisonment for not more than one year, or a fine of not more than \$1,000, or both such imprisonment and fine; but if the violation is committed after a conviction of such person under this section has become final such person shall be subject to imprisonment for not more than three years, or a fine of not more than \$10,000, or both such imprisonment and fine.”

The construction of the act by this Court is case of U. S. v. Dotterweich (320 U.S. 277, 64 S.C.P. 134), shows that such small farmer or other innocent party would be liable to the criminal penalties provided in the Act, notwithstanding there was no intent on his part to violate any Federal Law or regulation; and that the shipping of such material served a necessary purpose in the conduct of the renovated butter business.

Not only this, but under criminal code section 37, (U.S. C.A. Title 18, Sec. 88) if there were any agreement evidenced by any overt act on the part of the manufacturer or the truck driver or the small farmer who provided the country butter or packing stock, as raw material shipped in interstate commerce to a renovating plant, all of them would be subject to prosecution under the Conspiracy Stat-

ute, and would be subjected to the heavy penalties of that Statute, notwithstanding there was no intent on their part to violate any Federal Law.

The debates and reports in Congress at the time the Special Statute known as the Renovated Butter Act was adopted in 1902, both before the committee and on the floor, show the Congress was fully informed of the existing conditions; that the committee reported and Congress passed this Special Act in order to meet the situation, after having had continued hearings, lengthy debates, long reports and full deliberation on the subject under investigation. Not only that, but amendment after amendment was proposed and voted upon during the hearing. The condition to be remedied and the manner in which it was to be done were both known to Congress. At the time when the Act was re-adopted and re-enacted in 1939 (Internal Revenue Code, Sec. 2320 et seq) the Congress knew the history of the law and its long operation.

It is inconceivable that Congress, by general statute, intended to modify or destroy the Special Renovated Butter Statute or to repeal the same, or to destroy the Renovated Butter Industry, an established manufacturing business which had been operating successfully for nearly fifty years under the supervision of the Secretary of Agriculture.

The Federal Food, Drug & Cosmetics Act had another field of operation. Yet under the construction of the Federal Food, Drug & Cosmetics Act in the Court below; and as contended for by the Government here; and as declared in the Maple Syrup Case (110 Fed. (d) 914), and in the Dotterweich case, supra; if sustained by this Court; the Renovated Butter Industry would be outlawed and destroyed.

The Government contends that because the Meat Inspection Act was excepted from the operation of the Food, Drug & Cosmetics Act and the Renovated Butter Act was

not specifically excepted, the Congress intended for the Federal Food, Drug & Cosmetics Act to be applicable to the Renovated Butter Industry. It is our conviction that by reason of the fact that Congress had repeatedly sought to integrate the Renovated Butter Act with the Meat Inspection Act, Congress intended that exception in the Federal Food, Drug & Cosmetics Act to apply to the Renovated Butter Act.

However, passing that, Congress is presumed to have been fully informed of the existing special statute and never intended by a general law to nullify or repeal the special Renovated Butter Statute which had been successfully in operation for so many years.

This Court in the case of Securities and Exchange Commission v. C. M. Joiner Leasing Corporation et al (320 U. S. 344; 64 U. S. Sup. Ct. Rep. 320; 64 Sup Ct. Rep. 120) effectively disposes of the Government's contention in this respect.

THE NINE BARRELS OF BUTTER CASE

On page 6 of the Government's brief the statement is made:

"Even under the earlier statute, however, the Food and Drug Administration had seized packing stock butter consigned to process butter plants, and this had been upheld."

In support of this, the Government's brief cites United States v. Nine Barrels of Butter, 241 Fed. 499.

Again on page 8 the Government's brief says:

"The Food and Drug Administration had, under the predecessor Food and Drugs Act of 1906, repeatedly seized packing stock butter consigned to renovated butter plants." (Citing foot notes 4 and 5 of dissenting

opinion in the Patterson Case, supra, and *again citing* United States v. Nine Barrels of Butter, supra. Page 8 of Government's Brief.)

The Government's counsel is certainly in error in making the statement on both pages to the effect that the butter seized in the Nine Barrels Butter Case was *destined for renovation*.

This statement by the Government should be sufficiently refuted by the following quotation on the statement of facts written by Learned Hand, District Judge, set out in 241 Fed. Rep. on page 500:

"This treatment is known as 'ladling', and consists in dividing the butter into small portions, a pound or more in size, and in manually picking out with a trowel such parts as show dirty to the eye of the operator. The amount so removed varies generally from 2 to 5 per cent, but sometimes rises much higher. The butter thus cleansed is then put into a room at about 85° F., which makes it plastic and capable of being molded into pats of proper size and homogeneous quality. It is then colored evenly and sold only to bakers. In baking, the butter passes through a temperature of from 350° to 500° F., under which most of the rancid oils are volatilized and driven off. Under the evidence as given, it must be assumed that the butter so used by bakers is not deleterious to the public health."

It thus appears that the Government's brief is decidedly in error in saying the butter involved in the Nine Barrels of Butter Case was consigned to a renovating butter plant. The butter was shipped for ladling. The difference between ladling and renovating is vast; the former is merely the reworking, by manual process, the butter on a table and picking out visible foreign particles. In ladling nothing further is done and that term does not mean nor imply, melt, clarify, pasteurize and refine the butter or the re-

sulting butter oil as is done when the packing stock butter is renovated.

There should be no misunderstanding nor controversy about the decision of Judge Hand in this case. In the opinion he shows that he could not escape the conclusion that the butter there under examination was filthy and decomposed in part; and he held that he had the power to destroy, sell, or re-deliver the same to the owner under bond, acting under the Pure Food & Drug Act of 1906. The Court states that he might have delivered the goods to the owner upon the condition that they "ladle" the butter or that they otherwise treat it so as to secure the health of the community.

But the Court expressly held that *ladling* of the butter would not be permitted and then says as shown on page 501 of said opinion, *supra*:

"There is, however, another and much more radical method of cleansing such butter, known as 'renovating', which is as follows; The butter is melted to a fluid, so that all solid matters fall to the bottom. It is then strained and blown into a spray, in which condition hot water is allowed to percolate through the butter oil. The water is then drawn off, and an emulsion made with milk is then cooled into crystals, salted, and packed in containers. As such it is sold for table butter, and in many instances is unquestionably a useful article of food, and is permitted access to the markets, where it is not unlawful."

That opinion was rendered April 9, 1917. It is a matter of common knowledge and sustained by the opinion in the Patterson Case, *supra*, that great improvements have been made in the science of renovating butter since the Nine Barrels of Butter opinion was handed down. Under the authority of that decision after condemnation of the material, the trial court in its discretion could permit the

packing stock butter to be delivered to the owner under bond to be brought into compliance with the Federal Pure Food Law by a time-consuming, expensive, and tedious procedure set out in U.S.C.A. Title 21, Sec. 334, sub-section (d) of the Federal Food, Drug & Cosmetics Act.

If this tedious and expensive ritual were pursued under court order, where would the ultimate consumer gain any benefit whatsoever over the result now being obtained under the direct supervision and inspection of the renovated butter industry by the Secretary of Agriculture under the special statute known as the Renovated Butter Act of 1902?

The Government's brief on pages 9 and 10 refers to memorandum of the Chief of Bureau of Dairy Industry to the Solicitor of the Department of Agriculture, dated October 4, 1940; and to letter by the Assistant Chief of the Bureau of Dairy Industry to the Solicitor of the Department of Agriculture, written in July 1941, both of which are referred to and quoted in notes in dissenting opinion of the Chief Justice in the Patterson Case, *supra*.

The *renovated butter industry* might advisedly take issue with the statements quoted from the Chief of the Bureau of Dairy Industry referred to as set out in said foot notes.

However, it should be sufficient to say, that, as pointed out in the Patterson Case, 315 U. S. page 168 referring to the provisions of the Renovated Butter Act and regulations promulgated thereunder by the Secretary of Agriculture:

"Inspection of the factory and of the material was provided for explicitly. Confiscation of the finished product was authorized upon a finding of its unsuitability for food through the use of unhealthful or unwholesome materials, a finding that might be based upon visual or delicate laboratory tests, or upon observation of the use of such materials in the process of manufacture."

Thus, the Secretary of Agriculture may follow through any particular lot of packing butter about the use of which there could be any possible doubt or question from the delivery to the processing plant or even from the initial introduction of the raw material into interstate commerce through all the stages of manufacture to the completion of the finished product. If there is any question as to the finished product, or as to its wholesomeness and suitability for food, the Secretary has the absolute right and authority to seize and condemn the same.

Also whenever the finished product is introduced into interstate commerce the same becomes immediately subject to all the provisions of the Federal Food, Drug & Cosmetics Act.

The Government's brief on pages 11 and 12 referring to the dissenting opinion in the Patterson Case by the Chief Justice comments on foot note 5, 315 U.S. at page 179 of said opinion to the effect that between July 1, 1933, and January 1, 1942, 36 seizures were made of lots of butter which had been consigned to renovated butter plants.

We do not have access to records and reports of the 36 seizures referred to, but we call attention to the fact that the 36 seizures were over a long period of time and the number of seizures was comparatively insignificant. Neither do we know the subsequent result of the various seizures referred to. However, we assume that the seizures of butter mentioned consigned to petitioner are the same as those here involved. The Government cites no reported cases; and none has been called to our attention where such seizures have been challenged and any other court holds that the Federal Food, Drug & Cosmetics Act and the standards set up therein supersede in so far as the *raw material* is concerned, the *standards* as set up, recognized and established in the special act known as the Renovated Butter Act.

It is also a matter of common knowledge of which the

Court will take judicial notice that in many of the instances of seizure the amounts of packing stock butter involved were so small, a contest would not have been justified on account of the expense and loss of time.

The Court also knows that this is true of a great many Federal procedures and prosecutions. The cost and expense and time lost in litigating many rights which citizens deem to have been infringed or invaded by federal officers or agents is such that citizens submit and accept the penalty rather than go to the trouble and expense and loss of time necessary and required to vindicate their rights in the Federal Courts.

But in the present instance it is not just the butter seized. The life of the renovated butter industry is at stake, and the decision of the court below in its construction of the Federal Food, Drug & Cosmetics Act is such that it will be undoubtedly followed by the Federal Agents or the Administrator under the Federal Food, Drug & Cosmetics Act. Until the Supreme Court finally declares what the law really is, the greatest confusion and conflict of authority and of Federal Bureaus will result. And any producer or shipper of raw material, or manufacturer of Renovated Butter, would proceed in fear and trembling.

The Petitioner's fears that the renovated butter industry cannot survive in the event the Federal Food, Drug & Cosmetics Act is construed and applied as indicated by the opinion of the court below as applied to the raw material out of which process butter is manufactured are real and well founded.

The whole renovated butter business depends upon securing the raw material or packing stock butter not in its then condition to be used for human food but by scientific and constantly improving methods of treatment to be made fit by being melted, sterilized, centrifuged and strained into pasteurized butter oil which is mixed with sterilized



No 295

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CHARLES ELMER SMITH
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

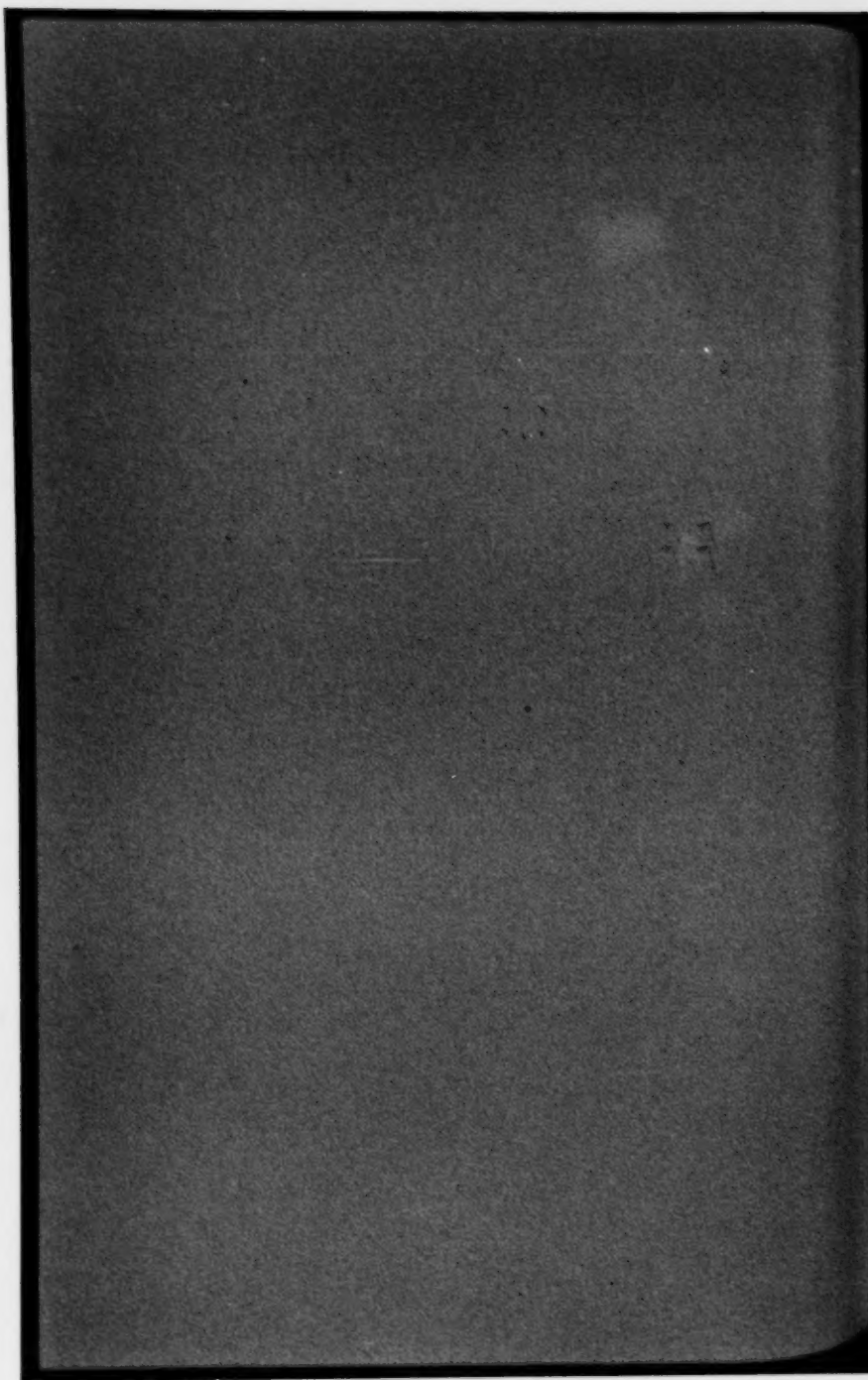
CLOVERLEAF BUTTER COMPANY, a corporation,
Petitioner (Claimant-Appellee Below)

vs.

UNITED STATES OF AMERICA
Respondent (Appellant Below)

**PETITION FOR REHEARING FROM JUDGMENT
DENYING PETITIONER'S PETITION FOR WRIT
OF CERTIORARI TO UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE FIFTH CIRCUIT**

**HORACE C. WILKINSON
ERLE PETTUS
VICTOR H. SMITH**
Birmingham, Alabama
Attorneys for Petitioner



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SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1945

CLOVERLEAF BUTTER COMPANY, a corporation,
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TO THE HONORABLE SUPREME COURT
OF THE UNITED STATES:

Now comes the Petitioner, Cloverleaf Butter Company, a Corporation, and respectfully, but earnestly, prays this Honorable Court to grant Petitioner a rehearing from the order or judgment rendered on, to-wit, October 15th, 1945, denying Petitioner's petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit in that certain cause determined by said Circuit Court of Appeals numbered 11040, United States of America, Appellant vs. 24 cans containing a total of approximately 1833 pounds of ladled butter in possession of Cloverleaf Butter Company, Birmingham, Alabama, et al., Appellees,

by which the judgment of the District Court for the Northern District of Alabama was reversed. As grounds for said motion, petitioner assigns the following, separately and severally to-wit:

1. Petitioner is, and had been for many years when the libels of the packing stock butter in question were instituted, engaged in the business of manufacturing process or renovated butter under Act of May 9th, 1902 (Chap. 784, Sec. 5, 32 Stat. 194-197) as amended August 10th, 1912 (37 Stat. 273) and re-adopted as Sections 2320-2327 Internal Revenue Code, known as the Renovated Butter Act. The subject matter of the libels is packing stock butter acquired, transported and held by petitioner solely for processing same under said Act.

The process or renovated butter industry is a substantial one. The product is made by extracting the butter oil from butter produced by small farmers in the Southeastern States who have no other market for the surplus over their domestic needs, and is known in the trade as packing stock butter. This country butter does not measure up to the standards of the Food, Drug and Cosmetics Act when sold by the producer.

The sole function of the process or renovated butter industry is to remove impurities and excess moisture in the country butter and make the *finished* product comply with the standards of the Federal Food, Drug and Cosmetics Act.

If the Food, Drug and Cosmetics Act is to be applied to the packing stock, the result will be that *every* lot of country butter will be subject to seizure and condemnation and all parties participating in shipments of such butter in interstate commerce will be subject to prosecution and penalties provided by the Food, Drug and Cosmetic Act. The renovated butter industry has operated since 1902 under the supervision and control of the Secretary of Agriculture and regulations promulgated by him as definitely provided

in the Renovated Butter Act. The scheme of the Renovated Butter Act and Regulations promulgated by the Secretary of Agriculture look to a thorough and efficient clarifying, pasteurizing and processing of butter oil drawn from the packing stock and a wholesome *finished* product under the control of the Secretary of Agriculture which would otherwise be lost. The test of the suitability of the raw material being the condition of such finished product. If the finished product is in any manner violative of the Food, Drug and Cosmetics Act, it is subject to seizure and condemnation and the shipper to the penalties as provided in that Act.

The Food, Drug and Cosmetics Act, as construed, does not recognize any salvage business. It has been held in the recent decisions such as *U. S. v. 52 Drums Maple Syrup*, (CCA 2nd Circuit) 110 Fed. (2) 914, that any component part of food not then meeting the requirements of that Act must be condemned; that the intention and undisputed ability to process the material so as to make it pure before it reached the public is immaterial. The only right to use such material being after seizure and condemnation, order of the Court to that end, payment of the costs, giving bond and defraying the expenses of a representative of the administrator during the operation. No business can operate when all of its raw material is subject to such restrictions, expense and delay to say nothing of the liability to fine and imprisonment in the case of every interstate shipment of such raw material.

2. The Circuit Court of Appeals in the decision sought to be reviewed, held in effect that the Food, Drug and Cosmetics Act applies to the packing stock butter, and that if the same be adulterated as defined in that Act, it must be condemned and that the Renovated Butter Act and its standards afforded no defense, regardless of the fact as that Court declared that the renovating process is well adapted

to remove all impurities and that renovated butter is good butter.

3. The Renovated Butter and Food, Drug and Cosmetics Acts have not been construed by this Honorable Court in any case wherein the point here involved has been presented.

The question vitally affects not only this petitioner, but every other manufacturer of process or renovated butter and the producers of the raw material. If the country butter cannot be transported without violating the law and the material confiscated, this being the only source of supply, the industry which for over 40 years has filled a public need, must go out of business.

4. The question as to whether the use of packing stock butter is to be determined by the standards of the Special Renovated Butter Act governing that industry, and the comprehensive regulations promulgated thereunder and the duties enjoined upon the Secretary of Agriculture, by which the final test is the wholesomeness of the finished product or by the provisions and standards of the Food, Drug and Cosmetics Act (a general law) which requires all component parts of food not in their then condition free from contamination to be condemned regardless of what will be accomplished by processing—must eventually be decided by this Honorable Court.

It is respectfully submitted that delay can only result in confusion and uncertainty.

5. The plight of the renovated butter industry is not fanciful, but real. If the decision of the Circuit Court of Appeals is to stand as the law, then the consequences of continued engaging in business would be ruinous.

The fact that during the period between July 1, 1933 and January 1, 1942, 36 seizures were made of packing stock butter (some of which being here involved) was urged by the Solicitor General as showing that the business

would not be seriously affected by seizure of *some* packing stock. There can be no middle ground. The industry is either subject to the Renovated Butter Act as regards the packing stock, or to *all* of the provisions of the Food, Drug and Cosmetics Act relating to all component parts of food; it cannot be thus regulated in part under one act and in part under the other. It should not be forced to exist merely by the grace of administrators who come and go or vacillate in their administration.

These previous comparatively insignificant seizures were doubtless in a way test cases. If this Honorable Court permits the decision of the Circuit Court of Appeals to stand, no one connected with the industry will know what his rights and responsibilities are. Undoubtedly, the case will be urged as a construction of the Act requiring the seizure of all packing stock butter that is contaminated in the slightest degree, and entirely displace the authority and duty of the Secretary of Agriculture under the Renovated Butter Act which requires him to cause a rigid sanitary inspection to be made of all process butter factories, and of the products thereof and the materials going into the same and empowers him to ascertain whether or not materials used in the manufacture are deleterious to health or unwholesome in the finished product, and if so found to confiscate the same. (I.R.C. Sec. 2325.)

If the raw material should be condemned under the Food and Drug Act, prosecution for continued transportation necessarily follows.

6. The construction of the Renovated Butter and Food, Drug and Cosmetics Acts, as declared by the Circuit Court of Appeals, is not only erroneous, but contrary to the rules of statutory construction as often declared by this Honorable Court.

7. The construction of the Renovated Butter Act as made by the Circuit Court of Appeals entirely disregards

the terms of that Act as well as its history, objects and purposes.

Respectfully submitted,

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All of Birmingham, Ala.

Attorneys for Petitioner

CERTIFICATE

The undersigned counsel for Petitioner hereby certify that the foregoing Petition is filed in good faith and not for delay.

This November 2nd, 1945.

HORACE C. WILKINSON

ERLE PETTUS

VICTOR H. SMITH

Attorneys for Petitioner

